No. 2963.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY, a corporation,
Plaintiff and Appellant,

vs.

E. A. FARRINGTON and L. A. HOUCK, co-partners, doing business under the name and style of PACIFIC TRANSFER COMPANY, J. DANIELS, H. SANDGATHE, doing business as SPRINGFIELD GARAGE, V. W. WINCHELL and F. M. HATHAWAY, co-partners, doing business under the name and style of EUGENE FORD AUTO COMPANY, and A. WILHELM and JOHN DOE WILHELM, co-partners, doing business under the firm name and style of A. WILHELM & SON,
Defendants and Appellees.

BRIEF OF PLAINTIFF AND APPELLANT.

UPON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

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STATEMENT.

Plaintiff in this action is a Michigan corporation engaged in the manufacture of automobiles and

automobile parts and selling the same under the general designation of "Ford."

In order to reach the widest market plaintiff has developed a highly organized and extensive system of agencies under which it appoints in the states, counties, towns and villages throughout the United States and elsewhere, where its product is sold, certain individuals, firms and corporations to act as its agents, each in a defined territory carefully specified in the contract of agency.

On the appointment of such agents plaintiff enters into written contracts with them, carefully defining the duties and powers of such agents and restricting their authority within certain limits.

Plaintiff does not sell its automobiles to wholesalers, dealers or others, but, through its said agents, itself sells directly to the individual member of the community who buys for his own use.

The Ford is perhaps, the most widely known automobile in the United States and agency contracts with the plaintiff are eagerly sought because the agent thereby secures the representation of a product sure to sell and out of which the agent can earn a sure and fixed commission. The widespread demand for Fords and the ease with which they can be sold makes an agency so desirable that agents will submit and agree to conditions in the agency

contract, and accept burdens which perhaps they would be unwilling to accept with any other automobile on the market.

The defendants, V. W. Winchell and F. M. Hathaway, partners under the name of Eugene Ford Auto Company, were appointed as limited agents of the plaintiff, and the contract appears in full in the transcript of record, pages 45 to 74, inclusive, and it will not be necessary at this point to copy this contract in full; it, will, however, be proper to copy portions thereof which have particular bearing on the questions presented by this appeal.

> "THIS AGREEMENT, made at Highland Park, Michigan, this 10th day of September, 1915, by and between the Ford Motor Company, a Michigan corporation of Highland Park, Mich., hereinafter known as the first party, and Eugene Ford Auto Co., of Eugene, in the State of Oregon, hereinafter known as the second party, WITNESSETH:
>
> "WHEREAS the first party is a manufacturer of a line of automobiles known as Ford automobiles and also of automobile parts and accessories, and
>
> "WHEREAS the second party has applied to the first party to be agent in certain territory hereinafter described, for the sale of

said Ford automobiles and parts, and first party is willing to appoint second party, with certain limited authority and upon the following terms and conditions only:

"NOW, THEREFORE, this witnesseth: appointment as limited agent:

"(1) That first party hereby appoints second party its 'Limited Agent' with certain authority as herein expressly stated only, for the purpose of negotiating sales of first party's product to users only, in the methods and upon the terms and within the territory herein specifically set forth.

POWERS.

"(2) That second party shall have no authority or power or duty whatsoever, except as herein expressly conferred.

"AUTOS ON CONSIGNMENT.

"(3) That first party will consign its Ford automobiles to second party to be sold to users only, and not for re-sale, upon bills of sale to be executed by the first party only, as hereinafter provided.

"TERRITORY.

"(4) The second party shall arrange for sales of Ford automobiles only to residents of the following specified territory shown on the attached map, and to no other, namely:

* * * * *

"DAMAGES FOR BREACH TERRITORIAL RESTRICTIONS.

"(5) The sales of Ford automobiles to residents outside of second party's own territory is a serious trespass upon the rights and earnings of other Limited Agents and Sub-Limited Agents, and tends to destroy the organization and business of the first party, and therefore, it is agreed that the territorial restrictions and limits set forth herein are of vital consequence to the first party and its business, as well as to the business of all other Limited Agents and Sub-Limited Agents, and therefore, for any and each violation of the same by the second party, second party hereby agrees to pay to the first party the sum of two hundred fifty dollars ($250.00) as and for liquidated damages. Said sum or sums may be deducted from any deposit he may have with the first party, or from any sums which first party may owe, for business done, to

second party. First party may also cancel this contract for any such violation.

"PRICES.

"(6) Second party shall arrange for sales of Ford automobiles to users at the first party's full advertised list prices only, current at date of sale, plus Fifty-three and 25/100 ($53.25) Dollars for each automobile for freight charges and delivery expenses, plus the amount, if any, of any present or future United States tax or excise upon or in respect of each automobile or sale thereof. Wherever the words "List Price" are used herein they mean the latest retail selling price established or fixed by the first party.

"CHANGES IN PRICES.

"(9) The first party may change the list prices of any of its products at any time it may choose, and second party shall conform to such changes immediately upon receiving notice thereof, and in case of increase or reduction in such list prices, first party shall not be bound to make any allowance to second party in cases of automobiles shipped before such changes take effect, and the second party's commission on automobiles as yet unsold by him shall be the difference between

the 85 per cent (85%) advanced by him on such automobiles and the new selling price; provided, that in case of a reduction in price the first party will allow to second party a proportionate rebate on his advances made on such automobiles as still remain unsold in his possession at the date of such reduction as to automobiles shipped to the second party within thirty days immediately before such date, but none as to those shipped prior to such thirty day period.

"ADVANCES.

"(10) Second party shall advance in cash to first party eighty-five per cent (85%) of the full advertised list price at the time of the consignment of its automobiles by first party to second party.

"FREIGHT.

"(11) Second party shall pay the freight from Detroit or branch factory and advance freight, if any, as the case may be, to second party's place of business.

"TITLE OF AUTOS.

"(12) First party shall retain all and complete title to each automobile until actual

bill of sale, signed and executed by first party, has been delivered to the vendee, who shall be only a user; that is, one who has purchased for immediate use and not for re-sale the Ford automobile, at full advertised list price, plus freight and delivery charges, and said United States tax or excise, if any, and without rebate, donation or drawback of any character whatsoever. And any attempt to sell or dispose of or deliver any Ford automobile at less than such price shall be utterly void and shall pass no title whatsoever.

"LIEN FOR ADVANCES. INSURANCE.

"(13) Second party shall have a lien on each Ford automobile for the eighty-five per cent (85%) advanced by him on the same and for freight paid by him on the same, and shall keep and maintain insurance so as to protect himself against loss.

"RETAIL BUYERS' ORDERS.

"(14) Second party shall take from each proposed purchaser of a Ford automobile and immediately forward to first party, a written order duly signed by him, upon the regular blank 'Retail Buyers' Order,' furnished by first party, without alterations or changes ex-

cept the filling in of blanks, and second party will make no arrangement for the sale of a Ford automobile without taking such written signed order.

"DEPOSIT ON AUTOS.

"(15) All deposits of money, checks, etc., on Ford automobiles made by proposed buyers shall be remitted immediately when received with Retail Buyers' Order to the first party who shall be the custodian thereof, and first party will make proper disposition thereof when the transaction is closed according to the rights of all parties.

"COMPANY MAY REJECT ORDERS.

"(16) The dealings of the second party with a proposed purchaser of an automobile or the taking of a signed order blank as herein required or a deposit or both, shall not constitute a sale, nor shall first party be bound to accept such order, but first party may wholly reject the same for any reason satisfactory to first party, and the proposed purchaser shall acquire no rights whatever in the automobile until delivery of the duly executed bill of sale as herein provided.

"WARRANTY.

"(18) Second party shall have no authority to make any warranty whatsoever of Ford automobiles, but the purchaser shall be referred to the provisions of the Retail Buyers' Order and Bill of Sale in that behalf. Second party shall have no authority to make any warranty representing first party, of any parts or accessories. The current printed literature issued by the first party will contain the only warranties of parts or accessories made by first party.

"CLAIMS AGAINST CARRIERS.

"(20) In case of damage to automobiles by carriers in transit to second party, collections from the carrier shall be made in the name of the first party as the owner of such automobile—

* * * * *

KEEP PLACE OF BUSINESS.

"(21) That second party will maintain on his own account and at his own expense, a place of business and properly equipped repair shop prominently located in Eugene for the purpose of conducting such Limited Agency business, and shall employ competent

and efficient salesmen, and first party shall not in any wise be responsible for the charges connected with such place of business, nor shall second party have any authority to render first party responsible for the rent, taxes, wages or other charges or liabilities of any nature whatsoever arising out of such business or in connection with such place of business.

"THEFT OR DAMAGE TO AUTOS. WILL SELL ALL AUTOS. CLAIMS BY THIRD PERSONS.

"(22) Second party shall safely keep and he hereby agrees to save first party harmless against them for damage of any kind to said Ford automobiles while in his possession under consignment and in consideration of his being granted this agency, he expressly agrees that he will bear all damage or injury arising from theft, accident, injury or other cause to said automobiles so consigned to him while in his possession, or while in transit from, first party to second party.

"REPAIRS, NUMBER PLATES, ETC.

"(25) Second party agrees that he will make repairs on all Ford automobiles in his

territory, or coming into his territory, whether sold through him or not, and to perform this work promptly and in workmanlike manner, and that he will not remove or alter the first party's patent plate, motor number, or other numbers or marks affixed to any Ford automobile, or suffer the same to be done, and that he will not materially change any automobile consigned to him by the first party.

"PATENTS.

"(27) First party owns, and the Ford automobiles are manufactured under, and embody the following letters patent of the United States, or some of them, namely: * * * *

"COMMISSIONS.

"(28) As second party's commission for making such sales of Ford automobiles, first party will, after payment by the purchaser, allow to second party (except in cases specified in sub-division nine hereof) fifteen per cent (15%) of such full advertised list price, and will allow to second party such freight and delivery charges, and United States tax or excise, if any, as aforesaid.

"ADDITIONAL COMMISSIONS.

"(29) First party agrees to allow and

pay to second party the following additional commissions on the net amount of business he shall do hereunder during the term of this agreement upon Ford automobiles, but not on Ford parts, repairs or accessories, namely: No added commissions whatever when his said business shall total less than $5,000.00, but when the second party shall have done such business (not including freight charges and not including his fifteen per cent (15%) commission) to the amount of $5,000.00, his right to additional commissions shall begin, and he shall be entitled to such added commissions as follows: * * * * *

"PAYMENTS TO SUB-LIMITED AGENTS SECURED.

"(30) It is agreed that such added commissions shall not be paid to second party until the second party shall have furnished satisfactory evidence to first party that all commissions and added commissions due or owing or which may later become due or owing the Sub-Limited Agents under the second party have been fully paid, or until satisfactory arrangements are made with the first party to insure Sub-Limited Agents being paid the commissions whch may be due or become due to them under their respective contracts.

'COMPANY MAY SELL DIRECT.

"(31) First party hereby expressly reserves to itself the right to make direct sales to customers in the territory above described, and in such case will pay one (and only one) commission of five per cent (5%) of the list price of the automobile or automobiles so sold, after it shall have received the full purchase price in cash, to the second party, or if there shall be a Sub-Limited Agent in that special territory and locality where such sale is made, then such five per cent (5%) shall be paid to such Sub-Limited Agent. This provision shall not apply to sales of parts or accessories, which are otherwise provided for herein, nor shall it apply to sales to or through Sub-Limited Agents, but only to those made by first party directly to purchasers domiciled or residing in said territory within the meaning of Sec. 4 of this agreement. First party shall not pay any commission to second party or his Sub-Limited Agents on any sales to residents outside second party's territory, even though delivery should be made within said territory to residents of such other territory.

"STOCK OF FORD PARTS.

"(32) Second party agrees that he will purchase from the first party on his own

account and carry on hand at second party's place of business aforesaid a stock of Ford parts that will inventory at all times during the term of this agency contract, not less than Two Thousand Dollars ($2000.00) at the list price, and first party shall have the right to send its representative to inventory such stock of Ford parts as second party may have on hand, at any time during the term of this contract. First party may cancel this contract for any breach of this provision. Inasmuch as the reputation of Ford cars is often injured by the use therein of inferior parts not made or furnished by the Ford Motor Company, therefore, the second party also hereby agrees that all his purchases of parts of Ford automobiles shall be made, as to all parts listed in its parts catalogue, exclusively from the first party, and that he will not use, sell or recommend to Ford owners similar parts manufactured by others.

"DEPOSITS.

"(40) As a guarantee of the full and faithful performance by the second party of all the terms and conditions of this agreement, the second party has deposited with the first party the sum of Eight Hundred Dollars ($800.00) in cash, and it is agreed that the

first party may, at its option, apply any part or all of said amount towards the liquidation of any past due accounts owing by second party to first party, or any other legitimate claims arising from the second party's failing to perform the obligations of this agreement, and the balance of said contract deposit, if any, shall be returned to the second party at the termination of this agreement and the fulfillment of all its requirements. In case of cancellation or termination of this contract as herein provided, such deposit balance on hand may be retained by first party as security for and until the fulfillment of all provisions hereof as to the winding up of the business of the agency and final disposition of all unsold cars as stipulated herein. Second party shall not be at liberty to treat said deposit as an offset against any accounts owing by him to first party.

"SUB-AGENCIES.

"(44) Second party shall appoint a Sub-Limited Agent or establish a properly equipped branch or garage for the sale and repair of Ford automobiles in every such city or town within the above described territory as shall at any time or from time to time be designated by first party, in order that first

party shall have adequate representation therein, and so that the public shall have at hand facilities for purchasing Ford automobiles, parts, repairs, accessories and supplies, and if second party fails to secure such Sub-Limited Agents, or establish branches as herein provided, then first party may do so, or first party may take such territory entirely away from second party, or first party may sell direct its automobiles, parts, accessories, etc., in such unoccupied territory, in any of which cases the second party shall not claim or be entitled to any commissions on business so handled.

"NO ASSIGNMENT.

"(47) The second party shall have no right to assign this contract, or any interest in the same, without the written consent of the first party.

"CANCELLATION.

"(48) This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either party shall be at liberty, with or without cause, to cancel and annul this contract at any time upon written notice by registered mail to the other party and such cancel-

lation shall also operate as a cancellation of all orders for automobiles, automobile parts or attachments which may have been received by the first party from the second party prior to the date when such cancellation takes effect.

"SALE OF AUTOS ON HAND AT TIME OF TERMINATION.

"(49) In case of the cancellation or expiration of this contract the first party may at its option retake possession of all such of the aforesaid automobiles as second party may have on hand on consignment, unsold at the date of such cancellation or expiration at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the second party and he undertakes (for the purpose of winding up the affairs of his said Limited Agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration the same to be made strictly under and in accordance with the terms of this contract provided, however, if, after reasonable effort on the part of second party to make such sale there shall remain on hand any such automobiles unsold after three months

from date of such cancellation or expiration, then on request by second party and payment by him to first party of ten per cent (10%) additional of the list price first party will sell said automobiles to said second party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make.

"TERMINATION.

"(51) Upon termination of this contract, whether by expiration or cancellation, all liability on the part of the first party, shall, except as to matters pending at the date of such termination, cease and determine, and the second party shall have no claim to commission, rebate or damage, notwithstanding transactions may thereafter take place with or sales be made to parties with whom the second party shall have dealt during the currency of this contract."

Agents of the Ford Motor Company are required by their contracts not only to find purchasers for Ford automobiles but they are also required to maintain places of business and repair shops at which purchasers of Ford automobiles can obtain that class of service which the authorized agents of the Ford Motor Company are obligated by their

contracts to give, and which purchasers of Ford automobiles are entitled to receive. In other words, purchasers of Ford automobiles obtain by their purchase not merely the machine, but a connection with all the agents of the manufacturer wherever situated, which entitles them, as owners of Ford automobiles, to the benefits of Ford service. Such purchasers acquire the right to service provided for by the twenty-fifth (25) condition of the contract between the plaintiff and its agents, wherein it is provided that, "Third party agrees that he will make repairs on all Ford automobiles in his territory, or coming into his territory, whether sold through him or not, and to perform this work promptly and in workmanlike manner."

The agent is further bound by his contract (Condition 21) to "maintain on his own account and at his own expense a place of business and properly equipped repair shop." He also agrees (Condition 31) to "carry on hand a stock of Ford parts."

When a person or corporation is appointed as a Ford agent and holds himself out to the public as such there follows a representation to the public that purchasers of Ford automobiles through such agent will receive not only the machine, but also the right to the class of service provided for.

Under such a contract the defendants, V. W. Winchell and F. M. Hathaway, under the name of the

Eugene Ford Auto Company, were appointed as agents of the Ford Motor Company for the sale of Ford cars and parts in the territory defined in the contract. Pursuant to the contract, a considerable number of automobiles were consigned to the said defendants, of which 37 were on hand and unsold at the time this action was commenced. It appears from the evidence that by its terms, this contract would have run to July 31st, 1916, but under the power reserved in the contract (paragraph 48, transcript of record, p. 72), the plaintiff exerised its right to cancel and annul the contract on or about the 26th day of May, 1916, and the contract terminated at that time, and said termination was rightful and within the rights and power of the plaintiff.

Upon the cancellation of the contract, plaintiff sought a return of the cars unsold and on hand, and not succeeding in obtaining the cars by other methods, brought this action of replevin, under which the marshal took possession of the cars which were subsequently delivered to the plaintiff. The defendants named have asserted that the contract referred to did not create a consignment, and the relationship between the plaintiff and said defendants was not that of principal and agent, but rather that of vendor and vendee, and in their answer they have asserted absolute title to the cars, and right to retain the same. Under the terms of the contract, if

the transaction was a consignment, said defendants would have been entitled to a lien upon the cars for the advances made by them under the terms of the contract (paragraph 13 of the contract, page 52, Transcript of Record). The said defendants in their answer (Transcript of Record, pages 10, 11, 12 and 13), claimed to be the absolute owners of the automobiles in question, which claim of ownership, of course, was inconsistent with the claim of a lien thereon as security for advances.

Defendants in their answer not only interposed a general denial to the allegation of the complaint, but asserted title in themselves to the property in dispute; in their third separate answer alleged a settlement; again in their fourth separate answer alleged ownership; and concluded with a prayer for the return of the automobiles taken under the replevin, or for their value, and for large damages by reason of the taking.

It is apparent from the record that this contention of defendants is based upon the claim that the contract between the plaintiff and the defendants, as its agents, was not what its language expressed, but that instead of a consignment to an agent, the actual transaction was a sale by the plaintiff to the defendants, with an attempt to control the prices and conditions of subsequent sales by the agents to the public in violation of the Act of Congress of July

2, 1890, known as the "Sherman Anti-Trust Act." It becomes necessary, therefore, to take this contract by its four corners and ascertain from the terms and provisions thereof whether the contract is what it purports to be—a contract for the purpose of appointing agents for the sale of automobiles, and providing for the consignment to such agents of automobiles for sale by the plaintiff through its agents to the public or whether the inference is justified that the contract of agency is not what it purports to be, but rather a mere subterfuge to conceal a sale for the purpose of enabling the manufacturer to control the prices at which dealers shall vend Ford automobiles to the general public.

It is the contention of the plaintiff not only that the contract is a bona fide contract of agency and consignment and to be interpreted according to the language used and the expressed intentions of the parties, but that the court is limited to the construction of the actual contract made rather than some other different contract which counsel may think, or claim or suggest as the real contract, made under cover of an agency contract, for the purpose of evading the Sherman law.

ASSIGNMENTS OF ERROR.

The Transcript of Record shows that appellant

has made 12 assignments of error, of which numbers 1, 2, 3, 4, 5, 10 and 11 relate to the error of the court in refusing or giving instructions to the jury, and the other assignments of error relate to erroneous rulings of the court in ruling upon the evidnce in the case; in directing the verdict which the jury should bring in; in taking from the consideration of the jury questions upon which there was some evidence to go to the jury; and in refusing to instruct that the contract involved in the case was a consignment contract.

It is also the contention of the plaintiff that the Court erred in giving instructions and ruling upon the trial in a manner which led the jury to assume that they were to give to defendants damages for matters growing out of the cancellation of the contract, notwithstanding the Court's ruling that the plaintiff was entitled to cancel the contract at any time with or without cause.

The plaintiff does not waive any of its assignments of error, and each will be particularly discussed in the course of this argument.

The contract shown in the record is the basis of plaintiff's plan of marketing its product, and all questions in this case lead back to the contract itself, and upon its validity depends not only the right of plaintiff to maintain this particular action, but also

its right to do business as now organized under the plan of consigning goods to agents with limited authority to sell for it.

POINTS AND AUTHORITIES.

I.

The contract set out in the complaint creates an agency and results in a bailment to the agent, not a sale.

Strum v. Boker, 150 U. S. 323, 37 L. ed. 1093-9.

Cole Motor Car Co. v. Hurst, 228 Fed. 280 (C. C. A.)

Harris v. Coe, 71 Conn. 163, 41 Atl. 554.

II.

A manufacturer has the right to fix the prices at which its sales agent shall sell and the territory in which it may sell.

Virtue v. Creamery Package Mfg. Co. 227 U. S. 8, 57 L. ed. 393.

Waltham Watch Co. v. Keene, 202 Fed. 225, 240.

Cole Motor Car Co. v. Hurst, 228 Fed. 280, (C. C. A.)

Whitwell v. Continental Tobacco Co., 125 Fed. 454.

III.

A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts.

Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S. 184, 50 L. ed. 432.

Hobbs v. McLean, 117 U. S. 567, 29 L. Ed. 940.

IV.

Where the contract does not by its terms create a restraint of trade, some evidence of an unlawful intent becomes essential.

Bigelow v. Calumet & Hecla Mining Co., 167 Fed. 728 (C. C. A.).

Cincinnati P. B. S. & P. Packet Co. v. Bay 200 U. S. 179-184, 50 L. ed. 428.

V.

A patentee has an exclusive right to make or use

or sell the patented article or to permit to others those rights or any one or any part of them.

Paper Bag Patent Case, 210 U. S. 424, 52 L. ed. 1122.

Bement v. National Harrow Co. 186 U. S. 70, 46, L. ed. 1059.

VI.

Courts are unwilling to put limits on the exercise of the privileges granted to a patentee by law, recognizing that as a function of Congress.

The Button Fastener Case, 77 Fed. 288-294.

VII.

Even if the contract could be construed as effecting a sale to the agent, nevertheless such sale would be a sale subject to conditions and restrictions and the courts recognize the right of a patentee to attach conditions to a sale of the patented article.

Keeler v. Standard Folding Bed Co. 157 U. S. 657, 39 L. ed. 848.

Bement v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1059.

VIII.

Only a sale **without condition or restriction** will pass the patented article out from under the monopoly which the law secured to the patentee. This limitation is recognized in all the cases.

Henry v. Dick Co. 224 U. S. 1, 56 L. ed. 645.

Bement v. National Harrow Co. 186 U. S. 70.

Bauer v. O'Donnell, 229 U. S. 1, 57 L. ed. 1041.

Bobbs-Merrill Co. v. Strauss, 210 U. S. 339, 52 L. ed. 1086.

Dr. Miles Medical Co. v. John D. Park & Sons, 220 U. S. 373.

IX.

An agent or vendee of a patentee may, by direct covenant or agreement, be bound to the observance of price restrictions, imposed as a condition upon which right of sale is exercised.

National Phonograph Co. v. Schlegel, 128 Fed. 733.

Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 154 Fed. 359 (C. C. A.).

American Graphophone Co. v. Boston Store, 225 Fed. 785.

X.

Competition is not affected by a contract between a patentee and his agents whereby the sale price is fixed.

Blount Mnfg. Co. v. Yale & Towne Mnfg. Co. 166 Fed. 555.

Virtue v. Creamery Package Mnfg. Co. 227 U. S. 32, 57 L. ed. 393.

XI.

In all the cases is found a recognition of the **distinction between** the right of a patentee to fix prices by **direct contract** and the attempt to do so by **mere notice** affixed to the article.

Dr. Miles Medical Co. v. John D. Park & Sons, 220 U. S. 373.

Bauer v. O'Donnell, 229 U. S. 1, 57 L. ed. 1041.

Bobbs-Merrill Co. v. Strauss, 210 U. S. 339, 52 L. ed. 1086.

United States v. Keystone Watch Case Co. 218 Fed. 502.

"TRUST LAWS AND UNFAIR COMPETITION" (United States Government Printing Office in 1916), pp. 579-580, 592-593, 651-652.

XII.

But if we should concede the construction of the contract asserted, nevertheless there has been no restraint of trade as measured by the rule of reason.

Whitwell v. Continental Tobacco Co. 125 Fed. 454 (C. C. A.).

Phillips v. Iola Portland Cement Co. 125 Fed. 594-5 (C. C. A.).

Bigelow v. Calumet & Hecla Mining Co. 167 Fed. 704-712.

Cole Motor Car Co. v. Hurst, 228 Fed. 280 (C. C. A.).

O'Halloran v. American Sea Green Slate Co. 207 Fed. 187-190.

United States v. Hamburg-American S. S. Line, 216 Fed. 971-2-4.

United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243.

Nash v. United States, 229 U. S. 373, 57 L. ed. 1232.

XIII.

Where the defendants in an action of replevin deny the plaintiff's title **and** right of possession, and assert ownership in the defendants and right of of possession, it is not necessary for the plaintiff to prove a demand prior to the institution of the action.

Brown v. Truax, 58 Or. 572-7.

XIV.

A claim of lien is inconsistent with a claim of ownership, and defendants in this case cannot rely upon a right of lien to retain possession of the property.

XV.

Where parties declare that a particular payment will not be accepted, without specific objection to the form in which the offer of payment is made, no questions can thereafter be raised as to the form of tender, nor is it necessary to renew or continue the tender.

XVI.

A tender or offer of payment is waived or be-

comes unnecessary when it is reasonably certain that the offer will be refused.

Hills v. Higgens, 105 U. S. 319, 126 L. Ed. 1052.

Whitney Company v. Smith, 63 Ore. 187, 146 Pac. 1000.

XVII.

It is error for the court to withdraw from the consideration of the jury a question upon which there is even a scintilla of evidence.

XVIII.

Where one party claims to have been damaged by the acts of another it is incumbent upon him to prove both the fact of damage, and the items making the amount thereof claimed.

ARGUMENT.

I.

While this action on its face is an action of replevin for the recovery of specific personal property and involves several questions peculiar to actions of that kind, yet there has been brought into question the system which plaintiff has developed and per-

fected for the selling of automobiles manufactured by it, pursuant to which it appoints numerous agents and enters into contracts with them, similar in all respects to the contract between the plaintiff and the defendants, Eugene Ford Auto Company, set out in full in the record in this case. It is the contention of the plaintiff that this contract is only what it purports to be—a contract of agency and bailment between the plaintiff and its agents. We respectfully submit that the rulings of the District Court in this point in particular are contradictory, as we shall endeavor to show, and did not properly enlighten the jury as to the rules by which they should be guided in arriving at their verdict.

Inasmuch as the major portion of this brief will be taken up with the discussion of that contract, in view of the claim made that it is violative of the Sherman Anti-Trust Act, it is proper first to discuss and dispose of the other questions involved in this record. It is undisputed that a contract was made on the 10th day of September, 1915, between the plaintiff and Eugene Ford Auto Company, of which contract a copy appears in the transcript of record, beginning at page 45, and pursuant to that contract a large number of automobiles were consigned to the defendant, and 37 thereof were on hand at the time this action was begun. It is undisputed that pursuant to the 10th paragraph of the contract the defendants had advanced to the plaintiff 85 per cent

of the list price of the automobiles so consigned, and were entitled to a lien thereon for that 85 per cent, unless the same was waived or released by them, which lien is secured by the 13th paragraph of the contract. It is also probable, although the testimony is not clear on that point, that the defendants were complying with the 21st clause of the contract with reference to maintaining the place of business which the contract obligated them to maintain.

There was some testimony and some discussion with reference to the deposit provided for by the 40th paragraph of the contract (Transcript, page 66), but the court properly withdrew the same from the consideration of the jury for the reason that there was no issue with reference thereto in the pleadings. The same applies also to the withdrawal by the court from the consideration of the jury of any question arising under the 29th paragraph of the contract (Transcript, page 61).

It is also beyond dispute that pursuant to paragraph 48 of the contract (Transcript, page 72), the plaintiff cancelled the contract by notice to the defendant given by telegram on the 24th day of May, 1916, and by letter on the 25th day of May, 1916, and that both letter and telegram were received in due course by the defendants. There can be no question but that the plaintiff was strictly within its rights in thus cancelling the contract, and that it was not

obliged to give any reason for cancelling, and the court so instructed the jury:

> "Now, the contract as entered into between the plaintiffs, the Ford Motor Company, and the defendants, as I said, was dated September 10th, 1915. It expired by limitation on the 31st day of July, 1916, but it contained a provision that either party to the contract might revoke or cancel it at any time without cause—without giving any reason for it, and it appears in testimony that the Ford Motor Company, exercising the right given by this contract, did in fact cancel it * * * prior to the time this action was instituted." (Transcript of Record, p. 115.)

It being plain that the cancellation was plaintiff's right, no inference of malice could be drawn from the fact of cancellation.

II.

ERRORS OF THE COURT IN INSTRUCTIONS RELATIVE TO DAMAGES.

THE VERDICT FOR DAMAGES NOT SUPPORTED BY EVIDENCE.

Paragraphs 49 (Transcript, page 72) and 51 (Transcript, page 73) provide as to the rights and

obligations of the parties in the event of a cancellation, and these provisions become of special importance by reason of certain instructions of the court which we have assigned as error. Paragraph 49 provides that in case of cancellation or expiration the Ford Motor Company may at its option retake possession of all automobiles on hand on consignment unsold at the date of cancellation or expiration, and return to the agent the advancements on account of such automobiles, or at the option of the Ford Motor Company the agent may be required, and he agrees, to endeavor to sell such automobiles as he may have on hand unsold notwithstanding the cancellation of the contract, subject to the terms of the contract relating to sales, but the right to make such sales, and as a result thereof to make the profits provided for in the contract itself in the event of sales, only exists in the event that the Ford Motor Company exercised the option to require the agent to continue efforts to sell, and did not exercise the option to retake possession of the machines. Unless the Ford Motor Company elected to require the agents to sell, they could have no right in any event or under any circumstances to count upon any more commissions, and the agents' only right to, or in connection with, said automobiles would be to retain possession thereof by reason of the lien created by the 13th paragraph of the contract until that lien should be satisfied, or the same waived by the conduct of the agents.

When the Ford Motor Company gave to the Eugene Ford Auto Company notice of cancellation by its telegram of May 24th and its letter of May 25th, 1916, the Eugene Ford Auto Company ceased to have any right to sell, or to do anything except hold a lien for their advances. The contract had been terminated, and the subsequent relations of the parties are carefully provided for by paragraphs 49 and 51 of the contract. It would seem then to be perfectly clear that the court was in error in instructing the jury that they might take into consideration in arriving at their estimate of the damages suffered by the defendants, the profits which the defendants might have earned by the sale of the automobiles replevined, and the verdict was wrongful because based upon such estimate of profits. This conclusion is emphasized by the provision of paragraph 51, where it says that "Upon termination of this contract, whether by expiration or cancellation, all liability on the part of the first party, shall, except as to matters pending at the date of such termination, cease and determine, and **the second party shall have no claim to commission,** rebate or damage, notwithstanding transactions may thereafter take place with or sales be made to parties with whom the second party shall have dealt during the currency of this contract." This gives double assurance to the clear conclusion that the agents could not claim any commissions after the cancellation of the contract, unless the Ford Motor Company exercised the option

secured to it to require the agents to sell the automobiles on hand notwithstanding such cancellation.

The court in instructing the jury (Transcript, page 106), gave the following instruction, which we think was of itself error requiring the reversal of this case:

> "Now, in estimating the damages you should keep in mind the amount that you allow as the value of these cars. The taking of the cars away from the defendants, of course, deprived them of the right to sell them and of any profits that they might have derived from the sales. That was one thing that, of course, was the result of this taking of the cars by the plaintiff company. Now, the profits on the sales would, of course, be a matter to be considered by the jury in arriving at your verdict in this case, but if you allow that on the value of the cars, that is, if you find that the value of the cars is the amount that is claimed by the defendants, which is the wholesale price with the 15 per cent added, or the profits that the defendants would have made if they had sold the cars, then you should not allow that same profit in estimating the damages. In other words, you should be careful not to allow the same item twice in the item of damages."

This instruction permitted the jury to take into consideration profits which might have been earned if there had been no cancellation, but profits to which defendants were in no way entitled after the cancellation. These profits are figured up in the sum of $2477.75, and aside from some testimony that the profits from the garage operated by the defendants amounted to approximately $300.00 a month, there was no other evidence of damages offered in this case.

The action was begun on the 29th day of May, 1916, and the judgment was entered on the 11th day of September, 1916, and at the rate of $300.00 a month, the maximum figure testified to by the defendants, the damages resulting from this source could not have exceeded $1030.00. We challenge counsel to show any other items of damage supported by any evidence in this case. It is alleged in their answer that "the business of these defendants has been destroyed, their business credit ruined, their standing in the mercantile world has been discredited, and they have been injured and damaged by the malicious acts of defendants, as alleged, to the sum of $25,000.00." In addition to the value of the automobiles replevined. There is not a scintilla of evidence to be found in the record showing any malice on the part of plaintiff, or showing, or tending to show, that the defendants' "standing in the mercantile world has been discredited" or "that their

business credit has been ruined," and so far as concerns the allegation that "the business of these defendants has been destroyed," it appears from the evidence that they entered into a contract with Vick Brothers **prior to the commencement** of the replevin proceedings to sell out for a sum less than $2,000.00 (Transcript, p. 258).

It clearly appears that the sale to Vick Brothers was a result of the cancellation of the contract and not of the replevin, and was actually agreed to prior to the beginning of the replevin proceedings.

The cancellation being rightful no claim for damages could be founded on it.

> "Q. Now, when the Ford Motor Company took possession of these cars under the writ of replevin, that was after you had agreed to, or had a tentative agreement to sell out the other business to Vick Brothers?
>
> A. Yes, sir." (Transcript, pp. 94-95.)
>
> "COURT: Was your transaction with Vick Brothers prior to the time the cars were replevined?
>
> A. Yes, it was, the time that we negotiated—that is, began to talk to Mr. Goden; he seemed so positive that the deal would go

through just as he stated, that we immediately began afterwards to invoice, before he came back from Portland.

COURT: When was it that Vick Brothers paid you the thousand dollars?

A. That was after the invoice.

COURT: Before or after the time that the United States Marshal took possession?

A. That was before the time." (Transcript, p. 103.)

"COURT: Then how do I understand that you base your claim that the replevining of these cars destroyed the garage business? You understand this contract only had two months to run, and in any event at the end of that time the company would have been under no obligations to sell you cars.

A. Well, you see, Vick Brothers had a deposit on our business and they had us tied up, you see, in a way.

COURT: On what part of your business?

A. On the garage end—accessories and parts.

COURT: That is because of their contract or agreement with you?

A. Yes, sir.

COURT: Your idea is then that the failure of the Motor Car Company, if I understand you correctly—the failure of the Ford Motor Company to carry out the preliminary agreement that you had with Mr. Goden was really the cause of your trouble?

A. Ye, sir.

COURT: That is the idea?

A. Yes, sir." (Transcript, pp. 104-105.)

By the certificate of the court which may be found in the transcript beginning with the last line of page 105, it appears that all the evidence to establish damage to defendants' business is to be found on pages 89 to 105, inclusive. This evidence covers the loss of profits on sales, to which defendants were not entitled, as we have shown; the deposit money and bonus money matters, which the court expressly withdrew from the consideration of the jury (Transcript, p. 314); and the profits of operation of a garage (p. 92); these last profits cannot be a basis of damages because they were cut out of consideration by the sale to Vick Brothers, which admittedly was prior to the replevin.

The court instructed the jury (Transcript, p. 311) that:

> "That is a question of fact for you to determine **from the testimony** what damages, if any, the defendants suffered; what was the damage to the defendants' business by reason of the fact that the plaintiff wrongfully took from their business these thirty-seven cars."

We, therefore, submit that not only was the verdict for $6,000 special damages not based upon any evidence in this record, and clearly and only an arbitrary award given in clear disregard of the court's specific instruction that the jury should not allow punitive damages, but, insofar as there is any basis on testimony actually received, the jury was erroneously instructed when they were allowed to include the profits which the defendants might have made had they been permitted to sell these cars, or the profit in operating the garage and business sold to Vick Brothers before the replevin case was filed.

III.

It is worth while to review the transactions under consideration in their chronological order—

> (a) The Ford Motor Company cancelled the contract with the Eugene Ford Auto Company May 24th or 25th, 1916. This cancella-

tion was within its rights and though it may have resulted in a loss to defendants of anticipated profits was not the basis of any legal complaint.

(b) The Ford Motor Company notified defendants that it proposed to set up Vick Brothers as its agents at Eugene in the place of the defendants. This it had a right to do and defendants could have on valid objection thereto.

(c) At the same time the Ford Motor Company notified defendants that "the territory and your stock will be taken over by Vick Brothers, who will open a branch at Eugene." As to the territory and the Ford cars that was within the Ford Company's rights under the contract. As to other stock Vick Brothers couldn't take that unless defendants agreed.

(d) But be that as it may, defendants did agree, and a contract was made by defendants with Vick Brothers by which they sold out to Vick Brothers, and this was a result of the cancellation and prior to the replevin.

The evidence above quoted from pages 104 and 105 of the transcript demonstrate by the testimony of the defendants themselves that their changed po-

sition and whatever resulted therefrom was fixed prior to the filing of the replevin case.

It will be noted in the testimony just referred to that Hathaway, a member of the Eugene Ford Auto Company, plainly testified that "The failure of the Ford Motor Company to carry out the preliminary agreement * * * was really the cause of the trouble."

Needless to say, that this is not an action to recover damages based on that preliminary contract. Whatever damages, if any, resulted from any failure by anyone to carry out that agreement are another story.

The court ruled (Transcript, p. 315) that the Ford Motor Company was not a party to the contract between the defendants and Vick Brothers. The defendants, the Eugene Ford Auto Company, sold out their business to Vick Brothers because of the cancellation of the agency contract, and thereafter were only interested in receiving the other half or less than half of the sale price. They clearly did not think it worth while to carry on business without the Ford Agency. Thereafter the defendants for some reason, probably because they could not agree with the Ford Motor Company as to the sums to be paid defendants by plaintiff, endeavored to back out of their contract with Vick Brothers, although one thousand dollars had been paid on account thereof,

and the taking of inventory was completed and Vick Brothers given possession. The controversy with Vick Brothers is apparently still pending and is the real source of defendants' grief. Of this situation, Hathaway, one of the defendants, testified (Transcript, p. 266):

> "A. I would answer it in this way: That the Ford Motor Company stopped us from carrying out our deal with Vick Brothers, and, of course, we interfered with having Vick Brothers come in and take that proposition at all until this other was settled, and I guess we interfered enough that it caused Vick Brothers and Summons to bring an action against us. Well, of course, we had to answer in that action." (Transcript, pp. 266-7.)

How the Ford Company "stopped" them "from carrying out our deal with Vick Brothers" appears in the answer made by these defendants in the action brought by Vick Brothers. No mention is there made of the replevin proceedings and for the purposes of this case, it is enough to say that the court ruled (Transcript, p. 315) that there was no such contract as alleged in said answer made on the part of the Ford Company.

> "COURT: I might call the jury's attention to that, although I think it is not very

> material. It seems Mr. Goden's interviews with these defendants, the first one he had, was a tentative interview, and he was required to report to his principal for instructions. He had no authority to bind the plaintiff by any contract because he was required to report to his principal and get instructions, therefore, there was no contract binding on the 29th day of May, 1914, because he had no authority to make such a contract.

The most that can be said is that defendants were hasty in entering into their contract with Vick Brothers. But it was that contract that put defendants out of business, and not the subsequent replevin, and everything on which defendants attempted to offer proof of damages resulted from that contract and not from the replevin, or from the cancellation of the agency contract which cancellation was rightful.

> "Again, in estimating the amount of damages to which the defendants are entitled, if any, you should bear in mind the fact that this contract had in fact been **legally cancelled prior to the time** the plaintiff took possession of these cars." (Charge to the jury, Transcript, p. 312.)

IV.

THE QUESTION OF TENDER.

There are certain other assignments of error which it is proper to take up at this time. The first assignment of error (transcript p. 33) is based upon the fact that under the terms of the agency contract, when the Ford Motor Company cancelled the contract and exercised its option to retake possession of cars remaining unsold in the hands of an agent, the contract provided that it should return to the agent the advances made by the agent to the Ford Motor Company, in accodrance with the 10th paragraph of the contract, for which the agent had a lien in accordance with the 13th paragraph of the contract. The rule undoubtedly is that when the owner of property proposes to exercise the right to retake the property which the defendant is entitled to withhold in its possession as security for money, it is necessary for the moving party to pay or tender the payment of the sums due. It was with this rule in mind undoubtedly that the court gave the instruction objected to in the first assignment of error. The court instructed the jury in part as follows: "So that the plaintiff would have been entitled to the possession of these cars if it had paid to the defendants $16,077.50, but the evidence shows that it did not make such payment, nor did it tender to the defendants this amount, or any

other amount on these cars, and, therefore, it is not entitled to the possession of the cars at the time this action was brought."

This instruction, as we propose to show, was erroneous both because it ignored the issues made by the pleading, and also because it took away from the consideration of the jury an issue upon which there was some evidence on which the plaintiff was entitled to go to the jury. It is proper to consider in connection with this erroneous instruction the refusal of the court to give the instruction mentioned in the second assignment of error, which was plaintiff's requested instruction No. 4:

> "I instruct you that payment to defendants of advancements on said automobiles by defendants before taking possession of the same, by the plaintiff, was not necessary if the defendants informed plaintiff or led plaintiff to believe, they would not accept said payment." (Transcript pp. 34-35, 117.)

Had the defendants in their answer not disputed plaintiff's title, but contented themselves with asserting a lien for their advancements, it would unquestionably have been necessary for the plaintiff to have proved a payment or tender of the amount of their advances unless defendants by some act on their part led plaintiff to believe that payment would not be accepted.

The answer in this case, after denying every allegation of the complaint, alleges (transcript p. 10) "that the defendants prior to the time of the commencement of this action had purchased all the Ford automobiles described in said complaint, and had paid the plaintiff the full purchase price required to be paid from them to plaintiff. * * * and title to the same passed from plaintiff to defendants, and defendants **became the owners** thereof, and prior to the time of the commencement of this action, and at the time of the commencement thereof were, and now are, **the owners thereof,** and entitled to the exclusive and immediate possession of the automobiles."

And again in their further and separate answer and defense, page 11 of the transcript, it is alleged "defendants were and are the **exclusive owners** of said automobiles, and each one of the same, and entitled to the **exclusive and immediate possession** thereof, and were in the lawful possession thereof at the time of the commencement of this action."

And again in the third further and separate answer and defense it is alleged—"That prior to the commencement of this action and on or about the 29th day of May, 1916, the plaintiff and the defendants V. W. Winchell and F. M. Hathaway had a settlement of the contract existing between plaintiff and defendants wherein and whereby the plain-

tiff and defendants adjusted their mutual accounts and reciprocal claims, and wherein and whereby the plaintiff agreed that the defendants were the owners of and did convey to defendants, V. W. Winchell and F. M. Hathaway, all claims of title on the part of plaintiff to the automobiles described in the complaint and each and every one thereof, and relinquished every claim of possession to the said automobiles and each and every one thereof." (Transcript pp 11-12.)

And again in the fourth separate answer and defense it is alleged: "That at the time of the commencement of this action these defendants were, and are now, **the owners** of the Ford automobiles mentioned in the complaint." (Transcript p. 12.)

No party can have a lien upon his own property for the lesser interest evidenced by lien is merged and swallowed up in the greater right of ownership. By asserting absolute ownership thus repeatedly and positively the defendants waived their right under the contract to hold a lien upon the property replevined, and the issue became one of claim of ownership on the part of the plaintiff and the denial thereof and assertion of title by the defendant. Under these circumstances, it is perfectly apparent that the defendants made it clear to the plaintiff that they would not accept the pay-

ment if it was offered, and requested instruction No. 4 above quoted should have been given.

The case of **Hills vs. Higgins, 105 U. S. 319, 26 L. ed. 1052,** is instructive. That was a suit for an injunction to restrain the collection of a tax alleged to be void because the assessor had not allowed to the tax payer a deduction from the assessed value of the property because of debts, as provided by the statute. The defense was made that the plaintiff was not entitled to the injunction because there had been no affidavit made, or proper demand for deduction. The court said:

> "A more difficult question is presented in regard to those who made no affidavit or demand for deduction, but who have shown that they would have been entitled to deduction if the demand had been properly made. That question is, whether the fact clearly established that their demand would have been unavailing, dispensed with the necessity of making the affidavit and demand. It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform **is waived or becomes unnecessary when it is reasonably certain that the offer will be refused;** that payment or performance will not be accepted.

> Such is the doctrine established by this court in repeated decisions in regard to another branch of law concerning the collection of taxes. Bennett v. Hunter, 9. Wall., 326 (76 U. S., XIX 672); Tracey v. Irwin, 18 Wall., 549 (85 U. S. XXI, 786); Atwood v. Weems, 99 U. S. 183 (XXV, 471)."

The Supreme Court of the State of Oregon in Whitney Company v. Smith, 63 Or. 187, 126 Pac. 1000, which was a suit for specific performance, said:

> "The defendant now urges that this testimony was not only hearsay, but that is failed to show that the plaintiff offered performance prior to the commencement of the suit. We think, however, the objection is not available for the benefit of the defendant, because, as he admits having denied the contract, which is virtually a disavowal of any liability thereunder, the law **does not require the plaintiff to do the vain thing of tendering payment** to a man who refuses in advance to be bound by any provision of the contract. In our judgment, under such circumstances, proof of a tender was unnecessary."

We, therefore, submit that as a proposition of law on the pleadings the court was in error in in-

structing the jury that a tender was necessary before the plaintiff could retake the property, but we submit further that the instruction given was erroneous for another reason—in that it assumes and instructs the jury that there was no evidence of tender when it clearly appears that there was in the record sufficient evidence to require the submission of that question to the jury. It should be borne in mind that the rule is well established that it is not necessary to produce the actual gold coin in hand and clink it in the hearing of the person to whom a tender is due to constitute a sufficient tender in the absence of any objection based on the failure to produce the actual money. If the objection is solely to the amount tendered, or it is stated positively that payment which it is proposed to make will be refused, no question can afterwards be raised as to the failure to produce the coin.

To demonstrate the error of the court in instructing the jury that plaintiff "did not tender to the defendants this amount, or any other amount on these cars," it is only necessary to quote some of the testimony in the transcript:

Mr. Goden, a witness for plaintiff, testified:

"Now, I have the money in the bank to pay you for those automobiles you have in your possession," and Mr. Winchell said, "You mean cash," and I said,

"Yes, I have got the cash." He says, "I won't do anything without I get cash from the Ford Motor Company." I said, "All right, the cash is in the bank. I can't get it tonight, but will get it in the morning." He says, "You mean you can get it in the morning? It is there?" I said, "Yes, it is there."

Q. Was there anything said there at that time by Mr. Hardy or anyone else with reference to whether or not they understood this to be a tender?

A. Yes, I took it up with that action, that I was tendering them the money. * * *

A. I said, "I am here for the purpose of making a tender to you of this money for these automobiles according to the contract." And then he spoke up and said, "Well, we will take that under advisement."

Q. Did you the next day make any attempt in any way to tender this money again?

A. Not excepting meeting, I believe it was Mr. Winchell on the street, and telling him the money was ready for them if they wanted it. (Transcript pp. 80-81-82.)

And one of the defendants, F. M. Hathaway, testified as follows:

A. Well, he said that could be taken care of afterwards. He says, "I can't say, you may just have to scrap that out with the Ford Motor Company, but I am prepared to pay the 85 per cent.

Q. Well, what else was said?

A. Well, we told him that we couldn't consider a proposition of that kind; that we were entitled to our bonus money and also to our deposit, and he said, well, he says, "I am only authorized to pay you the 85 per cent," and he says, "I have the authority, or have the money at the First National Bank, and can make you a check tomorrow morning."

Note the language of the defendant where it said "Well, we told him that we couldn't consider a proposition of that kind." Here in this quotation and in the testimony from which it is taken is a positive refusal to accept the 85 per cent unless other sums reasonably in question were paid at the same time.

Again on pages 268 and 269, transcript of record, we find further evidence by one of the defendants himself of a tender and a positive refusal:

Q. And what did he say they would do?

A. They would pay us the 85 per cent of the

selling price or list price of the Ford cars—these cars that were in question.

COURT: That is, they would return to you the money you had paid on the cars—was that it?

A. Yes, sir.

Q. And you refused to accept that?

A. Yes, sir.

We submit that the court must have forgotten this evidence when he instructed the jury that the defendants were entitled to the return of the property because there had been no tender of the amount of the advancements.

V.

QUESTION OF DEMAND FOR POSSESSION BEFORE BEGINNING REPLEVIN.

It was claimed by the defendants in the trial of this case, and apparently assumed by the court, that the defendants were entitled to a verdict for the return of the property for the reason that, and because it appeared in the evidence that there was no demand made by the plaintiff, or in its behalf, for the return of the property before the beginning of replevin proceedings.

That the question was brought to the attention of the court appears from the exception by the plaintiff to the actions of the court in directing the verdict in favor of the defendants, it appearing in the transcript (p. 116) that "the plaintiff duly excepted upon the ground that under the pleadings in this case a demand was unnecessary." The position of counsel for the defendant is stated in the first paragraph of page 114 of the transcript:

> * * * "and, as counsel has suggested, if their contract is valid, we were lawfully in possession of these machines, even if they owned them—we had acquired them lawfully and had a lien for 85 per cent on advances, and they didn't extinguish that lien and didn't make a demand, and the rule is absolute when a person can replevin personal property, even though it belongs to another, demand must be made for the return or the action for replevin will not lie."

The defendants (transcript p. 111) moved the court to instruct the jury that plaintiff had no cause to submit to them, and as the second ground therefor (transcript p 301) stated "Second, that the plaintiff had proved no demand before entering this action." And again top of page 304,—"and the rule is absolute when a person can replevin personal property even though it belongs to another, demand

must be made for the return or the action for replevin will not lie."

The court granted the motion to instruct the jury that the plaintiff had no case to submit to them, and held that the defendants were entitled to a ruling instructing the jury to return a verdict in their favor. Thereupon, the following proceedings were had:

MR. McDOUGAL: May we have an exception to the court's ruling on the motion to take from the jury the question of whether or not demand was made upon the defendants and a proper tender made to the defendants before the institution of the action?

COURT: Yes.

From this quotation and discussion of the record it is apparent that the court ruled that the plaintiff was obligated to prove a demand for the return of the property before instituting an action of replevin, and as it had not proven such demand it could not recover. This we respectfully submit constitutes error necessitating a reversal of this case. Whatever may be the law in other states, it is the settled law in the state of Oregon where this action arose, that where defendant in his answer claims the title to the property in question and the right of possession, no proof of demand for

the return of the property by the plaintiff is necessary. The answer of the defendants in this cause is an unequivocal assertion of title in themselves with the right to possession.

The Supreme Court of Oregon has said, **Brown v. Truax, 58 Or. 572-577:**

> "It is also claimed that plaintiff cannot recover in this action by reason of having failed to allege and prove demand upon defendant for the property.
>
> "Moreover, the defendant in his answer claims the title to the property, and, where such is the condition of the pleadings, no proof of demand is necessary. Smith & Co. v. McLean, 24 Iowa, 322; Homan v. Laboo, 1 Neb. 204; Shoemaker, Miller & Co. v. Simpson, 16 Kan. 43."

VI.

THE CONTRACT.

The 10th and 11th assignments of error lead up to the consideration of the agency contract in evidence in this cause, and a discussion of that contract is also a discussion of these assignments. It is a little difficult from the record to determine

CLAIM OF TITLE AND RIGHT OF POSSESSION BY DEFENDANT:

Where in replevin defendant claims title to the property and the right of possession incident thereto, no demand by plaintiff is necessary, although defendant may honestly believe that his claim is legal and just. So. if on the trial defendant contests the case upon the merits, basing his defense upon title in himself and the right of possession incident thereto, it is not necessary for plaintiff to prove a demand, nor in such case can defendant defeat the action on the ground that no demand was in fact made, although the case is one where a demand should have been made, since defendant's position on the trial is inconsistent with any supposition that he would have restored the property if a demand had been made. The rule that a demand is unnecessary where defendant contests the case upon the merits does not, however, apply to cases where a demand is necessary not merely as a basis for asserting the remedy, but to vest in plaintiff a right of possession, as where such right depends upon a condition which is broken only be a demand and refusal.

WHERE DEMAND WOULD HAVE BEEN UNAVAILING. No demand is necessary where it appears from the facts and circumstances of the case that a demand if made would have been futile and unavailing, and this fact may appear either from the acts or declarations of defendant in regard to the property before the action is instituted, or from the property before the action is instituted, or from the position taken by him upon the trial, as where he does not rely upon the want of a demand as a technical defense but contests the right of plaintiff upon the merits, claiming a superior right or title in himself.

WAIVER OF DEMAND. In cases where a demand is necessary in replevin it may be waived by defendant, or he may by contesting the case upon the merits and claiming title to himself be precluded from relying upon the absence of a demand as a defense to the action, but a refusal to comply with a demand made after the suit is begun and the writ issued will not prevent defendant from relying upon the defense that no demand was made before suit, and a mere denial of plaintiff's right to possession is not a plea of property in defendant and does not waive a demand where a demand is necessary to entitle plaintiff to recover.

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contract is also a discussion of these assignments. It is a little difficult from the record to determine

just how the court did rule upon the contract on the question of its validity or invalidity when attacked by the Sherman Anti-trust law. The court ruled clearly and unequivocally (transcript p. 310, 312, 314) that under the contract the plaintiff is entitled to cancel the contract and retake the property by the payment of advances. This, of course, assumes the validity of the contract, but the court without stating the grounds of its action, granted the defendant's motion to take the plaintiff's case from the jury, and as that motion was based upon the claim that the contract was in violation of the Sherman Anti-trust Law, it becomes incumbent upon us to discuss in full the contract, notwithstanding the fact that it appears that the trial court did not expressly rule as to the validity of the contract, but on the contrary (transcript p. 304) ruled—"As I interpret this contract, for the purposes of this case it is immaterial whether these cars were held by the defendants under consignment or as a sale." If the contract was valid, it must have been a consignment, and if invalid defendants claim it is a sale. The court based its ruling as to the immateriality of the contract, as has been said, on the absence of the demand and tender of repayment of the advances. As it is quite possible for this court to take a different view as to the materiality of the contract it becomes our duty to discuss it. We should preface our discussion, however, by calling attention to the fact that

not a particle of evidence was introduced to show invalidity, but the counsel for the defendants content themselves with asserting that upon its face the contract is in violation of the Sherman Anti-Trust Law. On the face of the record in this case, and without going outside that record, all there is before the court is an action of replevin to recover the possession of property consigned by plaintiff to defendants under the contract set out in full in the record, with the denial on the part of the defendants of plaintiff's right and assertion of title and ownership of the defendants.

It becomes, therefore, necessary at this time to take this contract **by its four corners,** and ascertain **from the terms and provisions thereof,** there being **no other source** from which light can be obtained, whether the contract is what it purports to be—a contract for the purpose of appointing an agent, and providing for the consignment to such agent of automobiles for sale by the plaintiff through its agent to the public, or whether the court is justified in this state of the record in inferring that the contract is not what it purports to be, but something else, and a mere subterfuge to conceal a sale for the purpose of enabling a manufacturer to violate the Sheman Law. It is the contention of the plaintiff not only that the contract is a bona fide contract of agency and consignment, and to be interpreted according to the language and intentions

of the parties as expressed by their language, but that the court is limited to the consideration and construction of the actual contract made, and cannot consider some other different contract which counsel may think, or claim, or suggest as the real contract made under cover of an agency contract for the purpose of evading the law. The contract shown in the record is the basis of plaintiff's plan of marketing its manufactured product, and all questions as to whether the transaction constituted a consignment or a sale lead up to the contract, and upon its validity depends the right of plaintiff to do business as now organized under the plan of consigning goods to agents with limited authority to sell for it. It will also be claimed that even if the agency contract should be construed as a sale to the agent nevertheless it must be held to be a sale subject to restrictions lawfully imposed by the plaintiff.

It is the contention of the plaintiff that this contract is only what it purports to be—a contract of agency and bailment between the plaintiff and its agent. It is the result of the contention made by the defendants that instead of a consignment by the plaintiff to its agent, there was a sale whereby the absolute and unconditional property in the automobiles passed from the plaintiff to the agent, and that the automobiles thereby became the agent's automobiles to do with as he chose, notwithstanding

the existence of the contract. This is the necessary effect of the defendant's claim of ownership, since it is admitted that the automobiles came into defendant's possession by reason of the contract shown in the record. Disregarding the fact that the contract between the plaintiff and the agent is clear and definite in all its terms, and precise in its use of language, nevertheless it is claimed that the language used is but a cover for the ulterior purpose of evading the law against combinations and restraint of trade. From the premise that the transaction was a sale, thus assumed, the conclusion is drawn that the transaction, or series of transactions, carried on under such agency contracts are in restraint of trade, and in violation of the Sherman Law. We believe it is capable of demonstration that the transaction was only what it purports to be—a contract of agency and bailment between the plaintiff and its agent, and that, therefore, the Sherman Law has no application to transactions under such contract, but further that the negative argument thus imposed upon us in a violation of the rule that a contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts, and that it was incumbent upon our opponents to demonstrate in some way, and offer some facts to support the claim that the transaction was actually a sale under cover of an agency contract, and we contend further that even if it should be

held that the net result of the transaction between the plaintiff and its agent was a sale by the plaintiff to the agent of the automobiles manufactured by the plaintiff, nevertheless the transaction was not obnoxious to the Sherman Law, as interpreted by the Supreme Court.

It is the position of the plaintiff that the agency contract under which it consigns automobiles to its agents creates a contract of bailment between plaintiff and its agents, and that thereunder the automobiles remain the property of the plaintiff until sales have been arranged by the agent on behalf of the plaintiff under the terms of the contract itself, and upon conditions specifically set forth.

VII.

THE CONTRACT ITSELF.

We rely upon the provisions of the contract itself as demonstrating that a bailment is the relationship created by the contract between the plaintiff and its agent. The preamble states:

> "Whereas, the second party has applied to the first party to be the agent in certain territory hereinafter described for the sale of said automobiles and parts, and the first party is willing to appoint second party with

certain limited authority upon the following terms and conditions only."

Thereupon follow paragraphs appointing the agent:

(1) "With certain authority as here expressly stated only, for the purpose of negotiating sales of the first party's product to users only, in the methods and upon the terms and within the territory herein specifically set forth.

(2) "That the third party shall have no authority or power or duty whatsoever, except as herein expressly conferred.

(3) "That first party will consign its Ford automobiles to the third party through the second party to be sold to users only, and not for resale, upon bills of sale to be executed by the first party only, as hereinafter provided."

The next paragraph limits the territory in which the agent may sell, and there follows a statement of agreed damages and penalties for any violation of the territorial restriction.

It is further provided that the agent will arrange for sales of Ford automobiles to users at the

first party's full advertised list prices only, and the right is reserved by the plaintiff to change the list prices of any of its products at any time it may choose, and the duty is imposed upon the agent to conform to such changes immediately upon receiving notice thereof.

The tenth condition of the contract is presumably the basis of the inference that the contract constitutes a sale only, and that all the other provisions thereof are subterfuges to conceal the sale.

> (10) "Third party shall advance in cash to second party or first party, as the case may be, 85 per cent of the full advertised list price at the time of its consignment of automobiles to third party."

The next condition provides that the agent shall pay all freight from the factory to the agent's place of business, but the 13th condition provides that the agent shall have a lien on each automobile for the 85 per cent advances by him and for the freight paid by him, and he is required to maintain insurance to protect himself against loss.

The 12th condition of the contract provides that the plaintiff shall retain complete title to each automobile until actual bill of sale signed and executed by it has been delivered to the vendee secured by the agent, and that such vendee must be one who

has purchased for use, at full list price plus freight and delivery charges, and that any attempt to sell or dispose, or deliver any Ford automobiles at less than such price, should be utterly void and pass no title.

Condition 14 of the contract requires that the agent shall take from proposed buyers a signed order to be transmitted to the plaintiff, which reserves the right to accept or reject the same for any reason satisfactory to it. (Condition 16.)

It will be noted in the clauses thus stated that by the contract the agent has no authority except that expressly conferred and that the agent receives a consignment of automobiles which are to be sold by the plaintiff, not the agent, upon bills of sale executed by the plaintiff, and the contract expressly provides that the duties of the agent are to arrange for sales of automobiles, retaining in the hands of the plaintiff the power to sell or refuse to sell, and to change the prices of its product at any time it may choose.

The fact that an agent, desiring to obtain the agency for the handling of Ford automobiles, is willing to and does agree to onerous conditions, does not justify an inference that the cash advanced by him pursuant to the contract was not actually an advance, but a payment, whereby the title

passed and the agent became the actual owner of the automobiles consigned.

It has always been a rule of law that contracts are construed to mean what they say. If the language used is simple, and the intention expressed is clear, then such contracts are enforced as expressed, if no violation of the law is thereby accomplished. Applying these rules, there can be no question but that the plaintiff clearly and effectually retained title to consignments of automobiles to the agent until all the conditions of the contract were fully complied with. It is violative of the language of the contract, and it is an inference from nothing contained in the record, to assume that the advance of 85 per cent, provided for in the contract, was not what the parties contracted it to be, but a payment of the full purchase price, resulting in a sale. Why should the agent contract, as in Condition 13, for a lien for his 85 per cent advance if by the transaction he became the owner of the automobile? The owner of property cannot, and need not for any advantage to himself, have a lien upon his own property, and the agent in the contract under consideration expressly accepted a lien on the automobile for his 85 per cent advance, and thereby expressly waived any claim to be the owner thereof.

A reading of the contract will disclose further

conditions which negative the contention that the agent became the owner of the automobiles, and not a word anywhere in the contract, directly or by logical inference, from which the affirmative of that proposition can be even inferred.

Condition 19 provides that the agent shall have no authority to warrant any of the automobiles, although warranty is an incident of ownership, and Condition 21 provides that in case of damage to automobiles by carriers in transit to the agent, collection from the carrier shall be made in the name of the plaintiff as the owner of such automobiles, thus affording another conclusive indication of ownership in plaintiff.

By contrast, Condition 31 shows the careful choice of language by the parties to this contract. Automobiles could come into the agent's hands by consignment only, but parts he was required by this paragraph of the contract to **purchase** and carry on hand.

Condition 47 of the contract contains another, and also a conclusive demonstration of the proposition that the contract was a true consignment and not a sale, wherein it is provided that in event of cancellation or expiration of the contract, first party to the contract (the plaintiff), "may at its option re-take possession of all such automobiles as the third party (the agent), may have on hand

on consignment unsold at the date of such cancellation or expiration, at the same time returning to him his advancements on the said automobiles, or at the option of the first party, it shall be the duty of the third party, to endeavor to sell such remaining automobiles, notwithstanding the expiration of the contract, but if, at the end of three months he shall not have made such sales, the first party agrees on request of the agent, upon payment of 10 per cent additional of the list price, to sell said automobiles outright to the agent.

A contract right on the part of the consignor to take back property sold and return the consignee advances is as clear a negative of the assertion that the transaction was a sale by which the title passed as it is possible to conceive of, and if title had already passed and the automobiles became the property of the agent, why should he pay an additional 10 per cent, or receive a bill of sale of property already his?

By the preceding clause of the contract (Condition 46) either party to the contract, "shall be at liberty, **with or without cause,** to cancel and annul this contract at any time."

If a sale had taken place as to automobiles consigned to and in the agent's hands, nothing would remain on a cancellation of the contract except to

settle any balances not adjusted and the Ford Company could not re-take by refunding the price.

But Conditions 46 and 47 are not capable of such an interpretation, and demonstrate that there was no sale, and that the Ford Company could at its option re-take its machines and refund to the agent his advances.

The plaintiff in this case has deemed it to be for the best interests of its trade to itself retain control of the distribution of its product to actual users thereof rather than to sell the same outright to wholesalers and retailers and permit them to distribute on such terms as they may see fit.

Plaintiff believes that it is for the advantage of the manufacturer of a product of wide and general use by the public, to so deal with the public that each member thereof may feel that he is receiving as good consideration and treatment as each and every other member of the public, and only by retaining in its own hands contact with the ultimate consumer can this uniformity of treatment be secured.

As has been said, plaintiff believes that it is for its best interest to vend direct to the ultimate consumer through the medium of agents rather than sell outright to dealers who may vend to the ultimate consumer on such conditions as the dealer

may select, depriving the consuming public of that uniformity of treatment, which, amongst other things, contributes so highly to the popularity of plaintiff's automobiles.

It is a matter of common knowledge that plaintiff's product has a very wide distribution, and sells readily in response to a wide public demand. To act as an intermediary in the distribution of such a product, and thereby earn commissions, is a representation which naturally would be eagerly sought for, and to secure it agents may well and profitably submit to onerous conditions that might not be worth while in connection with a less popular product. Such a motive is sufficient to account for the willingness of an agent to agree to the requirement of an 85 per cent advance. He could even profitably advance to the manufacturer the full retail list price and all carrying charges and yet be well compensated when his commissions were paid to him.

VIII.

THE RECORD CONTAINS THE CONTRACT.

Bearing in mind that there is no syllable in this record impugning the good faith of the Ford Motor Company and its agents in making the contract under consideration, no valid reason exists

why the contract should be interpreted otherwise than by the usual tests or why it should not be construed in accordance with the usual and ordinary meaning of the language employed.

There is not even an ambiguity to which to attribute a doubt as to the intentions of the parties. To attribute to the parties some intention not to be found in the language employed is to disregard the contract actually made and clearly expressed, and attribute to the parties something not shown to have been even thought of, much less intended.

And why? The question can only be answered on the theory that, for some reason not disclosed by the record, the court has arrived at the conclusion that the parties intended to violate the law, and hence by reasoning backward it is concluded that the parties did not intend those results which alone can follow from the language of their written contract, but something sinister, some evasion, some device to conceal the real transactions, and therefore that what the parties called a consignment was actually a sale.

Having thus traveled in a circle to find a premise, the conclusion could easily be drawn that the Sherman law was violated and that the attempt by the Ford Motor Company to fix the price at which the automobiles made by it should be sold was beyond its right.

IX.

THE PRINCIPAL HAS THE RIGHT TO CONTROL ITS SALES AGENTS.

But a wide difference exists between the attempt by a patentee to project its control over prices to future sales after it has exercised the right to vend secured by the patent laws, and the power of a patentee to fix the prices at which its sales agents shall sell and to describe the territory within which the agent may act. This distinction is clearly apparent to the court in the case of **Waltham Watch Co. v. Keene, 202 Fed. 225, 240:**

> "In the case of D. E. Virtue and Owatonna Fanning Mill Co. v. Creamery Package Mfg. Co. et al., 227 U. S. 8, 33 Sup. Ct. 202, 57 L. Ed. ——, decided by the Supreme Court of the United States January 20, 1913, the Owatonna Company was a manufacturer of churns and butter workers under various patents owned by it, and in April, 1897, it created the Creamery Package Manufacturing Company, its sales agent of them, the latter not manufacturing, which the court held it had the right to do, and that in so doing it had the right to fix the prices at which **its sales agent should sell** and the territory in which it would sell, and even the

purpose for which it should sell. The court said:

'It is true they granted rights to the Creamery Package Manufacturing Company, and exclusive rights; but this was no violation of law. The owner of a patent has exclusive rights—rights of making, using, and selling. He may keep them or transfer them to another—keep some of them and transfer others. This is elementary; and, keeping it in mind, there is no trouble in estimating the character of such rights or their transfer. Of course, patents and patent rights cannot be made a cover for a violation of law, as we said in Standard Sanitary Manufacturing Co. v. United States, ante. But patents are not so used when the rights conferred upon them by law are only exercised.'

"The case just cited has nothing to do with restrictions, license agreements, or contracts attempting to fix the prices of such articles on resales when the sole right of vending has once been exercised by the sales agent. As stated, an exclusive sales agent of the manufacturer under a patent is but exercising the sole right to vend expressly conferred by the patent statute."

Cole Motor Car Co. v. Hurst, 228 F. 280, C. C. A.,

was case where, as in the case at bar, the lower court held contracts to be "sales" and hence in conflict with the anti-trust laws, and the Circuit Court of Appeals, on an analysis of the terms and conditions of the contract, reversed the case and held the contracts to be consignments, and not in restraint of trade.

Hurst was designated as "distributor." He had to remit in full for all sales and the company sent check weekly for commission due. If a sale, Hurst would have held out his commission. The distributor was bound to insure in the name of company. This presupposes an insurable interest and title in the company. There were provisions for cancellation of the contract and return of unsold cars. No conditions were attached to company's right to take back machines whenever it chose to do so. The company retained unqualified rights of dominion and control which were inconsistent with the theory that the transactions were sales.

Not only was the contract not contrary to anti-trust laws, but the court said:

> "On the contrary, its effect is to foster the trade of the plaintiff company, and to enhance its business, to make secure its returns. This sort of arrangement is not obnoxious to the law. (Phillips v. Clement Co., 125 F. 593.)

> "It will be seen that it was not a contract which conveyed title to Hurst, and brought his control of the machines under the operation of the Texas law. Surely the Cole Company had the right to determine that its agents should sell its cars at its own prices."

No amount of care or thought could devise a contract that would more clearly express an intention to create the relationship of principal and agent between the Ford Motor Company and its agents and provide for consignment of automobiles to such agents, retaining to the Ford Motor Company, absolute control over the agents and their dealings as such representatives, than the contract now under review.

As was said in the last quotation:

> "Surely the Cole Company had the right to determine that its agents should sell its cars at its own prices."

And why should not the same rule and reason apply if we substitute for the words "Cole Company" the words "Ford Motor Company"?

We submit that language precisely applicable to the case at bar was used in the case of Sturm v. Boker, 150 U. S. 323, 37 L. ed. 1093-9:

"It is too clear for discussion, or the citation of authorities, that the contract was not a sale of the goods by the defendants to Sturm. The terms and conditions under which the goods were delivered to him import only a consignment. The words 'consign' and 'consignment' employed in the letters were used in their commercial sense, which meant that the property was committed or entrusted to Sturm for care or sale, and did not by any express or fair implication mean the sale by the one or purchase by the other."

Again,

"The contract in its terms and conditions meets all the requirements of a bailment. The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. * * *

"The agency to sell and return the proceeds, or the specific goods if not sold, stands upon precisely the same footing, and does not involve a change of title."

The case of Harris v. Coe, 71 Conn. 163, 41 Atl. 554, involved the construction of an oral contract

concerning which evidence had been recieved in the trial court. The Supreme Court said:

> "Was the contract in question one of sale or bailment? What the terms of the agreement entered into by the parties were, is a question of fact, upon which the decision of the trial court is final. What the legal effect of the provisions of the contract is, is a question of law, which may be reviewed on appeal."

And after reviewing the evidence and pointing out the good faith of the parties and concluding that the transactions showed a consignment for sale, the court said:

> "A consignment of goods for sale is ordinarily a bailment. The word 'consignment' does not imply a sale. The very term imports an agency, and that the title is in the consignor."

It will be seen that we are engaged in arguing in behalf of a contract which not only has every legal intendent in its favor, but is based upon sound business judgment and experience, and is effective to produce proper and desirable results. Because the effect of such a contract generally applied to all the representatives of the plaintiff and governing the distribution of its entire product of auto-

mobiles, is to enable the plaintiff to fix a uniform price at which all its automobiles shall be purchased by the ultimate consumer, does not create such a restraint of trade as to be violative of the Sherman Law, and yet we can only explain the contention that the contract is invalid by the assumption that any arrangement under which a uniform price to the consumer is fixed is violative of the Sherman Law, and that a premise must be found from which to deduce that conclusion, and the assumption that the transaction was a sale and not a bailment afforded the necessary premise. But a uniform price is not wrong in itself nor is it conclusive that there is a violation of the Sherman Act.

X.

RECENT LEGISLATION BY CONGRESS MATERIALLY AFFECTS THE RULES OF PUBLIC POLICY APPLICABLE TO PRICE MAINTENANCE CONTRACTS.

Congress, since the decision in the Miles case and the Sanatogen case, has made some most important pronouncements on the subject under discussion in those cases—pronouncements having an important bearing upon the so-called "Public policy as to uniform prices."

Section two of the Clayton Act (Effective October 15, 1914) condemns discrimination in prices

between customers on the same commodity as unlawful, when employed to substantially lessen competition or create a monopoly.

This is a most decided declaration of Congress upholding the virtue of uniform prices and condemning the practice of making different prices to different people for the same article.

Section 5 of the Federal Trade Commission Act (Approved September 26, 1914) declares to be unlawful "unfair methods of competition."

Thus we have at the same session of Congress two important declarations affecting the public policy of the United States on this subject—one upholding the policy of uniform prices and the other condemning certain forms of competition.

Time was when any and all forms of competition were regarded as highly virtuous and worthy of encouragement by the court.

But these declarations point out clearly that the thing to be condemned is monopoly, whether produced by competition or combination.

Fundamentally this is the true and only inquiry —Do the acts in question tend substantially to bring monopoly? What then is monopoly? What constitutes such a monopoly as to be subject to condem-

nation by the courts? Do the acts under investigation tend substantially to bring about such a monopoly?

We submit no public good demands competition in a single article of manufacture of a single maker, where there are large numbers of manufacturers in the same line, and when there is abundant active competition in that line.

If uniformity of prices on the same article is desirable, then any system of a manufacturer designed to bring about such uniformity to the public should be favorably construed to effectuate such object, and should never be condemned unless plainly in itself illegal, that is mala in se.

XI.

A CONTRACT PRESUMED TO BE LAWFUL UNLESS THE FACTS CLEARLY INDICATE OTHERWISE.

It is our contention that the contract under consideration contemplated a normal, a proper, and customary relation between principal and agent, and we submit to the court that:

> "A contract is not to be assumed to contemplate unlawful results unless a fair con-

struction requires it upon the established facts."

Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S. 184, 50 L. ed. 432.

Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940.

"But if the articles of partnership were fairly open to two constructions, the presumption is that they were made in subordination to and not in violation of Section 3737; and if they can be construed consistently with the prohibitions of the section they should be so construed. For it is a rule of interpretation that where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful the former must be adopted."

In **Bigelow v. Calumet & Hecla Mining Co., 167 Fed. at page 728,** the Circuit Court of Appeals said:

"But when the agreement or combination in question does not in its terms provide for the suppression of competition or the creation of a monopoly, nor bring about such a result as a necessary legal consequence, but requires further acts or conduct to bring about such an unlawful result, some evidence

> of an unlawful intent becomes essential, that the court may see that, if not stopped, a prohibited restraint is likely to be created."

And further:

> "The burden of showing acts and circumstances which establish the fact that an unlawful result is contemplated and will ensue, unless checked, is upon those asserting the illegality of the contract assailed.
>
> "In **Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S., 179-184, 50 L. ed. 428, it is cogently said,** in respect to the question as to whether a particular combination or agreement will operate to produce an unlawful result under the anti-trust law, that 'a contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts.' "

The contract between plaintiff and its agent is clear and definite in language and precise in its use of terms, and no word can be found therein which even squints at a sale.

In fact the entire argument on which is based the conclusion that the legal effect of the contract is a sale to the agent begins and ends with Condition 10 of the contract (transcript p. 21), which

provides that the agent shall advance to the company eighty-five per cent of the list price of the automobiles to be consigned to him and receive fifteen per cent as his commission. The inconclusiveness of this reasoning to contradict the plain language of the contract or to impeach the good faith of the parties is apparent. It is a case of basing an inference on an inference and drawing thence a conclusion, a form of argument not to be tolerated in legal proceedings.

We find pertinent in this connection another quotation from **Hobbs v. McLean,** from which we have just quoted:

> "This is the plainly expressed meaning of the partnership contract, and it is only by a strained and forced construction that it can be held to effect a transfer of Peck's contract with the United States and to be a violation of the statute."

The relation of the Ford Motor Company and its agent is that of bailor and bailee for mutual benefit, the subject of the bailment being the consignment of automobiles, and the object the employment to negotiate for sales by the bailor of its property. The relation might well be termed that of principal and factor—a relation long regarded as beneficial in the transaction of business, and one

whose legal effect has been defined by numerous decisions. The property consigned is bailed and remains in the ownership of the consignor until disposed of by the consignee in pursuance of the agency established by the fact of consignment.

The Ford Motor Company and its agents have the right to select the conditions under which they will contract, no matter how onerous those conditions may seem to others.

XII.

IF THE AGENCY CONTRACT BE IGNORED AND A SALE CONTRACT BE CONSTRUCTED BY THE COURT IT WAS AT LEAST A SALE SUBJECT TO CONDITIONS. SALES SUBJECT TO CONDITIONS ARE VALID.

We have thus far discussed the contract as it reads, and as the parties made it, and as we contend it should be considered, there being nothing in the record on which to impeach its good faith or question its terms as expressing the actual relationship between the parties.

It is to be remembered that no evidence was offered for the purpose of showing any violation of the Sherman Law, and on this aspect of the case we are restricted to the language of the contract itself.

It is our position that the contract in question is what it purports to be, an agency and consignment contract, and that the Sherman Act has no application to the transactions disclosed by the record in this case, but we are prepared to go further and contend that even though it be conceded for the purposes of argument that the contract is capable of being interpreted as providing for sales whereby the agent acquired the full and complete ownership of the automobiles consigned to him, yet, that nevertheless the Sherman Law was not violated. Unless the court is prepared to eliminate the contract in its entirety and itself construct for the parties a new contract out of the tenth condition of the actual contract, the transaction was at least a sale subject to conditions which must be complied with by the purchaser and which can be enforced against him.

XIII.

THE CONTRACT CONCERNED A PATENTED PRODUCT.

It appeared from the record that Ford automobiles are manufactured under numerous letters patent of the United States, and these patents are enumerated in the contract. (Transcript pp. 58-59.)

As a preliminary it may be well to remind our-

selves that a patentee is granted by the law broad and exclusive rights. He may make, sell, or use or not as he will. He may grant to others these rights or any of them, or any part of them or of any of them, and impose conditions on the exercise of the rights granted.

All discussion of this proposition has led to but one conclusion, as stated in **Paper Bag Patent Case, 210 U. S. 424, 52 L. ed. 1122:**

> "It shows that, whenever this court has had occasion to speak, it has decided that an inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute. 'And, for his exclusive enjoyment of it during that time, the public faith is pledged.' Chief Justice Marshall in Grant v. Raymond, 6 Pet. 242-3."

And again in **Bemet & Sons vs. National Harrow Company, 186 U. S. 70, L. Ed. 1059,** the Supreme Court said:

* * *

> "Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few

> exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

The right of the patentee to sell the patented article **subject to conditions prescribed by contract between the patentee and the vendee** has been recognized by numerous decisions of the Supreme Court, and restrictions thus created are within the rights secured to the patentee by the patent laws and not obnoxious to the Sherman law.

In the case of **Keeler v. Standard Folding Bed Co., 157 U. S. 657, 39 L. ed. 848,** the court said:

> "Where the patentee has not parted, by assignment, with any of his original rights, but chooses himself to make and vend a patented article of manufacture, it is obvious that a purchaser can use the article in any part of the United States, and, **unless restrained by contract** with the patentee, can sell and dispose of the same."

After discussing several prior decisions as to the rights of a patentee the court further said:

> "The scope and effect of those decisions were thus expressed by Mr. Justice Clifford, in **Mitchell v. Hawley, 83 U. S., 16 Wall. 547 (21 L. ed. 323):**
>
> " 'Patentees acquire by their letters patent the exclusive right to make and use their patented inventions and to vend to others to be used for the period of time specified in the patent, but when they have made one or more of the things patented, and have vended the same to others to be used, they have parted to that extent with their exclusive right, as they are never entitled to but one royalty for a patented machine, and consequently a patentee when he has himself constructed a machine and sold it **without any conditions,** . . . . and the consideration has been paid to him . . . . must be understood to have parted to that extent with all his exclusive right.' "

In the preceding and following quotations the black-face are ours and call attention to the recognition by the courts of the distinction we make that it is only a sale **without condition** or **restriction** that passes the patented article out from under

the monopoly which the law secures to the patentee.

In the Dick case (224 U. S. 1), the court said:

> "By a sale of a patented article **subject to no conditions,** the purchaser undeniably acquires the right to use the article for all the purposes of the patent, so long as it endures. He may use it where, when, and how he pleases, and may dispose of the same unlimited right to another. This has long been the settled doctrine of this and all patent courts. . . . . By such an **unconditional** sale of the thing patented it is said to be 'no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress.'
>
> "In the cases cited above, as well as in the leading case of **Bloomer v. McQuewan, 14 How. 539,** the statement that a purchaser of a patented machine has an unlimited right to use it for all the purposes of the invention, so long as the identity of the machine is preserved, was made of one who bought **unconditionally; that is, subject to no specified limitation** upon his right of use."

And further:

"An **absolute and unconditional** sale operates to pass the patented thing outside the boundaries of the patent, ... The rule and its reason is thus stated in **Robinson on Patents, Vol. 2, §824:**

'The sale must furthermore be unconditional. Not only may the patentee impose **conditions limiting** the use of the patented article, upon his grantees and express licensees, but any person having the right to sell may, at the time of sale, restrict the use of his vendee within specific boundaries of time or place or method, and these will then become the measure of the implied license arising from the sale.'"

Further:

"We repeat. The property right to a patented machine may pass to a purchaser with no right of use, or with only the right to use in a specified way, or at a specified place, or for a specified purpose. The unlimited right of exclusive use which is possessed by and guaranteed to the patentee will be granted if the sale be **unconditional.**"

And in the same case the court said:

"Where, then, is the line between a law-

ful and an unlawful qualification upon the use? This is a question of statutory construction. But with what eye shall we read a meaning into it? It is a statute creating and protecting a monopoly. It is a true monopoly, one having its origin in the ultimate authority, the Constitution. Shall we deal with the statute creating and guaranteeing the exclusive right which is granted to the inventor with the narrow scrutiny proper when a statutory right is asserted to uphold a claim which is lacking in those moral elements which appeal to the normal man? Or shall we approach it as a monopoly granted to subserve a broad public policy, by which large ends are to be attained, and therefore to be construed so as to give effect to a wise and beneficial purpose? That we must neither transcend the statute, nor cut down its clear meaning, is plain. In **E. Bement & Sons v. National Harrow Co., 186 U. S. 70, 89-92, 46 L. ed. 1058, 1068, 1069, 22 Sup. Ct. Rep. 747,** this court quoted with approval the language of Chief Justice Marshall in **Grant v. Raymond, 6 Pet. 218, 241, 8 L. ed. 376, 384.** Concerning the favorable view which the law takes as to the protection extended to the exclusive right, the court, through Chief Justice Marshall, said:

"'It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield, it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged.'"

And further, in discussing the prior case of **E. Bement & Sons** against **National Harrow Company, 186 U. S. 70,** the court said:

"In E. Bement & Sons there was involved the legality of certain contracts between patentees of and dealers in patented harrows. The purpose and effect of the combination and of the contracts between the

parties was to fix and keep up the prices at which licensees might sell the patented harrows. It was claimed that the combination and contracts were obnoxious to the Sherman act; but, upon the other side it was said that as the contracts concerned only the sale of patented articles, that that act did not apply. The character of the monopoly granted under the patent act was therefore involved. Touching the right of the patentee to exclude all others from the use of his invention, the court quoted with approval what was said in the **Button-Fastener Case, 77 Fed. 288,** as follows:

"'If he see fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own.'"

. . . . . .

"In that case the question was not one of infringement, but one arising in a suit to enforce certain contracts directly restraining commerce in patented articles which were claimed to violate the Sherman law, although the agreements covered only patented articles. The court, after referring to the exceptions to the patentee's monopoly resulting

from conflict with the police power of the state, said:

"'Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.'

"Now if this was a suit to recover damages upon the contract not to use the machine except in connection with other articles proper in its use, made by the patentee, the only possible defense would be that the agreement was one contrary to public policy, in that it affected freedom in the sale of such articles to the user of such machines. But that was the nature of the defense made to the suit to enforce the agreements under consideration in the Bement case. The court in that case found that the contracts did

include interstate commerce within their provisions and restrained interstate trade, but with reference to the Sherman Act (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200) said:

" 'But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act, we have no doubt, was never contemplated by its framers.'

"As to whether the restrictions upon sales imposed by the agreements were 'legal and reasonable conditions,' the court said:

" 'The provision in regard to the price at which the licensor would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented ar-

ticle can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.'

"If the stipulation in an agreement between patentees and dealers in patented articles, which, among other things, fixed a price below which the patented articles should not be sold, would be a reasonable and valid condition, it must follow that any other reasonable stipulation, not inherently violative of some substantive law, imposed by a patentee as part of a sale of a patented machine, would be equally valid and enforceable.

. . . . . .

"The provision in regard to the price at which the licensor would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can,

> of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

In the Bement case it is held that a license to make and sell can be burdened with restrictions on the price at which the licensee can sell.

After such a licensee has paid the cost of manufacture and the royalty to the patentee it is impossible to distinguish his position and title as to the product from that of one who has acquired the patented article from the patentee paying a price which includes the same elements and is substantially the same as that paid by a licensee, that is to say, the cost of manufacture and a compensation to the patentee based on his ownership of the patent.

And, as was said in the Bement case,

> "The plaintiff, according to the finding of the referee, was at the time when these licenses were executed the absolute owner of the letters patent relating to the float spring tooth harrow business. It was therefore the owner of a monopoly recognized by the Constitution and by the statutes of

> Congress. An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such article himself or to authorize others to sell it."

That we have stated the correct rule is borne out by the interpretation put on the Sanatogen and Bobbs-Merrill decisions in some recent cases.

In American Graphophone Co. v. Boston Store, 225 Fed. 785, the court in quoting from those decisions pointed out that in those cases there was no question of **contract** but only of attempt to fix prices by **printed notices,** and concluded:

> "That an agent or vendee of a patentee may, by **direct covenant or agreement,** be bound to the observance of price restriction, imposed as a condition upon which exclusive right of sale by the patentee is being exercised."

And in discussing the Bement case, which settles the rights to impose price restrictions on a licensee to make and sell, the court said:

> "The covenant for price restriction in the Bement and other cases referred to, although found in a license to manufacture and sell, was germane to the patentee's exclusive right

> of sale. . . . . It is impossible, in my judgment, to draw a tenable distinction between those cases and the case of a direct sale by the patentee of his patented article."

The opinion of the Circuit Court of Appeals, Seventh Circuit, in the case of **Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. 359,** is full and convincing.

In that case the arrangement by which the patentee sought to maintain prices, was attacked as in violation of the Sherman act.

The court, in the course of its opinion, said:

> "Under its constitutional right to regulate interstate commerce Congress made illegal 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states,' and subjected to liability to fine or imprisonment 'every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states.' Congress, having created the patent law, had the right to repeal or modify it, in whole or in part, directly or by necessary implication. The Sherman law contains no reference to

the patent law. Each was passed under a separate and distinct constitutional grant of power; each was passed professedly to advantage the public; the necessary implication is not that one iota was taken away from the patent law; the necessary implication is that patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states. The evils to be remedied by the Sherman law are well understood. Articles in which the people are entitled to freedom of trade were being taken as the subject of monopoly; instrumentalities of commerce between which the people are entitled to free competition were being combined. The means of effecting and the form of the combination are immaterial; the result is the criterion. The true test of violation of the Sherman law is whether the people are injured, whether they are deprived of something to which they have a right. **Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. ed. 679.**

. . . . . .

"The only grant to the patentee was the right to exclude others, to have and to hold for himself and his assigns a monopoly, not

a right limited or conditioned according to the sentiment of judges, but an absolute monopoly constitutionally conferred by the soveriegn lawmakers. Over and above an absolute monopoly created by law, how can there be a further and an unlawful monopoly in the same thing? If plaintiff were the sole maker of Grant tires, how could plaintiff's control of prices and output injure the people, deprive them of something to which they have a right? Is a greater injury or deprivation inflicted, if plaintiff authorizes a combination or pool to do what plaintiff can do directly? To say yes means that substance is disregarded, that mere words confer upon the people some sort of a right or interest counter to the monopoly, when by the terms of the bargain the people agreed to claim none until Grant's deed to them shall have matured.

. . . . . .

"None of the provisions of the contract, in our judgment, touched any matter outside of the monopoly under the patent. The control of prices and output, for reasons already stated, did not deprive the public of any right."

XIV.

A PRINCIPAL MAY LAWFULLY CONTROL ITS AGENTS.—COMPETITION NOT AFFECTED THEREBY.

It should be borne in mind that the case at bar is not one where rival manufacturers of competing products seek to eliminate competition in the sale of their products, but concerns only the marketing of one independent porduct actively competing with scores of other automobiles of equal or greater attractiveness. The distinction is pointed out in the case of **Blount Manufacturing Co. v. Yale & Towns Manufacturing Co., 166 Fed. 555,** where owners of competing patents entered into an agreement for the elimination of competition and the pooling of profits. The court said of that:

> "A contract whereby the manufacturers of two independent patented inventions agree not to compete in the same commercial field deprives the public of the benefit of competition, and creates a restraint of trade."

But, the court also uses language which seems to us to cover all that plaintiff could be charged with having done in its attempt to regulate the prices at which its product should be sold:

> "It seems self-evident that a contract which is only co-extensive with the monopoly conferred by letters patent, and which creates no additional restraint of trade or monopoly, does not conflict with the Sherman act. The monopoly granted by letters patent is of a particular invention. Devices thus protected by patents are as a matter of fact in commercial competition with both patented and unpatented devices."

Assuming that the contract in the case at bar was a contract whereby the patentee sought to regulate the prices at which the patented article should be sold, we contend that such a contract is only co-extensive with the monopoly to which the patentee is by law entitled. The contract does not restrain trade beyond the life of the patent, or create any additional restraint of trade beyond the privilege which the patentee unquestionably has to vend the patented article or refrain therefrom and refuse to the public the use of it.

As was said by the Supreme Court in **Virtue v. Creamery Package Mfg. Co., 227 U. S. 32, 57 L. ed. 393, 404:**

> "The owner of a patent has exclusive rights,—rights of making, using, and selling. He may keep them or transfer them to an-

> other,—keep some of them and transfer others. This is elementary; and, keeping it in mind, there is no trouble in estimating the character of such rights or their transfer. Of course, patents and patent rights cannot be made a cover for a violation of law, as we stated in **Standard Sanitary Mfg. Co. v. U. S., 226 U. S. 20, 57 L. ed. 107.** But patents are not so used when the rights conferred upon them by law are only exercised. The agreement of the 19th of April, 1897, constituted, as we said, the Creamery P. M. Co. a sales agent of the churns and butter workers and fixed their list price."

And after further discussing the contracts alleged to be in restraint of trade the court said:

> "The Owatonna Company **did nothing more in its contract** with the Creamery Package Mfg. Co. than **to make that company its exclusive sales agent, and this was no violation of law.** . . . . But, be that as it may, we repeat, patent rights may be conveyed partially or entirely, and the monopoly of use, of manufacture, or of sale, is not one condemned by law."

In the Dick case the court further used this pertinent language:

> "The market for the sale of such articles to the users of his machine, which, by such a condition, he takes to himself, was a market which he alone created by the making and selling of a new invention. Had he kept his invention to himself, no ink could have been sold by others for use upon machines embodying that invention. By selling it subject to the restriction, he took nothing from others, and in no wise restricted their legitimate market."

Suppose the Ford Company had itself rented stores or garages in each of the towns where it desired to have its automobiles sold and put in charge there of its employees, and secured by borrowing from local banks the money it might need, pledging as security therefor the automobiles shipped to the local garage, certainly no question would or could be raised as to its right to instruct those employees as to their duties, including the prices at which they could sell automobiles. Here certainly would be no restraint of trade.

And the situation is legally in no way different where the Ford Motor Company selects and appoints a local man as an agent and consigns automobiles to him to find buyers therefor to whom it can sell, and requires that agent to maintain a garage and shop for giving service to Ford owners

and receives from that agent by way of advances against consignments of automobiles such sums of money as may be agreed upon.

Such an agent is no less under the direction and control of the Ford Motor Company than an employee sent out from the factory. The principal is certainly not prohibited by any rule of law from dictating the prices at which its automobiles shall be sold by its agents, nor is the situation altered by the fact that there are hundreds of similar agents all governed by identical contracts.

By the contract shown in this record the relationship created is that of principal and agent and if the contract is interpreted by the usual canons of interpretation, no other meaning can be found in it.

Nothing in this record justifies the suspicion of an attempt to evade any law. The fact that the Ford Motor Company is a very large concern, that its production of automobiles is enormous, that its agents are very many, surely is not yet a violation of law.

> "There is no limit in this country to the extent to which a business may grow." **United States v. Eastman Kodak Co., 226 Fed. 80. United States v. International Harvester Co., 214 Fed. 1000.**

We respectfully submit that the conclusion that the Sherman law is violated by the contract under consideration can only be explained by the mere bigness of the transactions involved. Having arrived at the conclusion that the Sherman law was violated, a premise could be found for that conclusion only by holding that there was no agency or consignment but rather a sale by the pretended principal to the alleged agent, and hence a mere device to evade the Sherman law.

XV.

RESTRICTED OR CONDITIONAL SALES.

But the premise is not sufficient to support the conclusion.

The agent, if he be held a buyer, did not buy for use but only for resale, and the transaction was a sale subject to restriction, not an unconditional sale, and no appellate court has yet denied the patentee the right **by contract** to impose conditions on the disposition that a purchaser for resale and not for his own use may make of the patented article. The right to refuse to sell at all is beyond question, and that right includes the right to make any kind of a partial or restricted sale that may be agreed on.

The market for Ford automobiles was one created by the Ford Motor Company and as the Supreme Court said in the Dick case, in the last quotation just made:

> "was a market which he alone created by the making and selling of a new invention."

And again:

> "By selling it subject to the restriction, he took nothing from others and in no wise restricted their legitimate market."

And in further discussing this right of a patentee to sell or refuse to sell the court further said in the Dick case:

> "This was pointed out in the Paper Bag case, where the inventor would neither use himself nor allow others to use, and yet was held entitled to restrain infringement, because he had the exclusive right to keep all others from using during the life of the patent. This larger right embraces the lessor of permitting others to use upon such terms as the patentee chooses to prescribe. It must not be forgotten that we are dealing with a constitutional and statutory monopoly. An attack upon the rights under a patent because it secures a monopoly to make,

to sell and to use, is an attack upon the whole patent system. We are not at liberty to say that the Constitution has unwisely provided for granting a monopolistic right to inventors, or that Congress has unwisely failed to impose limitations upon the inventor's exclusive right of use. And if it be that the ingenuity of patentees in devising ways in which to reap the benefit of their discoveries required to be restrained, Congress alone has the power to determine what restraints shall be imposed. As the law now stands, it contains none, and the duty which rests upon this and upon every other court is to expound the law as it is written. Arguments based upon suggestions of public policy not recognized in the patent laws are not relevant. The field to which we are invited by such arguments is legislative, not judicial. The decisions of this court, as we have construed them, do not so limit the privilege of the patentee, and we could not so restrict a patent grant without overruling the long line of judicial decisions from circuit courts and circuit courts of appeal, heretofore cited, thus inflicting disastrous results upon individuals who have made large investments in reliance upon them.

"The conclusion we reach is that there

is no difference, in principle, between a sale subject to specific restrictions as to the time, place, or purpose of use, and restrictions requiring a use only with other things necessary to the use of the patented article purchased from the patentee.

. . . . . .

"Some of them concern sales subject to a restriction upon the price upon resale, and others relate to a requirement that the article sold shall be used only in connection with certain other things to be bought from the patentee. We deem it well, however, to refer to the opinion of the circuit court of appeals of the eighth circuit, delivered by Judge (now Mr. Justice) Van Devanter in National Phonograph Co. v. Schlegel, cited above, because it draws so clearly the distinction between a conditional and an unconditional sale of a patented article. Speaking for the court, Judge Van Devanter said:

'"An unconditional or unrestricted sale by the patentee, or by the licensee authorized to make such sale, of an article embodying the patented invention or discovery, passes the article without the limits of the monopoly, and authorizes the buyer to use or sell it without restriction; but to the extent that

> the sale is subject to any restriction upon the use or future sale, the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly. This results from the fact that the monopoly is a substantial property right conferred by law as an inducement or stimulus to useful invention and discovery, and that it rests with the owner to say what part of this property he will reserve to himself and what part he will transfer to others, and upon what terms he will make the transfer.'"

National Phonograph Co. v. Schlegel, 128 F. 733, from the opinion in which the Supreme Court took the quotation above repeated, and gave to it the stamp of its approval, was a case where a **contract** was entered into binding a purchaser not to resell for less than certain named prices, or to any other dealer who did not sign a contract, and **it was held that such contract was valid and enforcible** in a suit to restrain future violations of the contract.

The Ford Motor Company is given by law a monopoly under its patent enumerated in the contract in question. It is entitled to refrain from making, or vending, or using the patented article,

and it is entitled to prescribe the conditions under which it will permit others to make, sell or use, and no steps which it may take to protect those rights can be obnoxious to the Sherman law.

XVI.

DISTINCTION BETWEEN RIGHT TO CONTROL SALES AND PRICES BY CONTRACT AND ATTEMPT TO DO SO BY NOTICE.

We pass now to the distinction apparent in the leading cases between what may be done by a contract between parties in privity and what cannot be done by attaching a notice to an article sold. This distinction is apparent in many of the cases we have hereinbefore discussed, and we have been at some pains to call attention to it.

THE SANATOGEN AND MILES MEDICAL COMPANY CASES DISTINGUISHED.

The case of **Dr. Miles Medical Company v. John D. Park & Sons, 220 U. S. 373,** did not involve patented articles, or rights under the patent law. The other case,—**Bauer v. O'Donnell, 229 U. S. 1-10, 57 L. ed. 1041-3,**—contains no mention of the Sherman Act and was a suit to restrain the alleged infringement

of a patent by a retail dealer in selling at a price less than that marked on the package.

In the Miles Medical Company case the articles sold were made under a secret process but not protected by any letters patent. In that case the Court said in this connection:

> "First. The first inquiry is whether there is any distinction, with respect to such restrictions as are here presented, between the case of an article manufactured by the owner of a secret process and that of one produced under ordinary conditions. The complainant urges an analogy to right secured by letters patent. E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747. In the case cited, there were licenses for the manufacture and sale of articles covered by letters patent, with stipulations as to the prices at which the licensees should sell. The Court said, referring to the act of July 2, 1890 (p. 92): **'But that statute clearly does not refer to that kind of a restraint of interestate commerce which may arise from reasonable and legal conditions imposed** upon the assignee or licensee of a patent by the owner thereof, **restricting the terms** upon which the article may be used and the **price to be demanded therefor.** Such a construction of the

act we have no doubt was never contemplated by its framers.'

"But whatever rights the patentee may enjoy are derived from statutory grant under the authority conferred by the Constitution.

* * * * *

"The complainant has no statutory grant. So far as appears, there are no letters patent relating to the remedies in question. The complainant has not seen fit to make the disclosure required by the statute and thus to secure the privileges it confers. Its case lies outside the policies of the patent law, and **the extent of the right which that law secures is not here involved or determined.**"

(Black-face ours.)

Packages of "Sanatogen" were marked with a notice that they were not to be sold by retailers at less than $1.00 per, and infringement of the patent was charged against a retailer who sold for less.

All that was decided was that there had been no infringement, and that the Sherman law was not involved.

The Court in the course of its decision said:

"The patentee relies **solely** upon the notice

quoted to control future prices in the resale by a purchaser of an article said to be of great utility and highly desirable for general use. The appellee and the jobbers from whom he purchased were **neither the agents nor the licensees of the patentee.**"

(Black-face ours.)

It was held that the holder of the patent could not thus control the price. Where purchase was made from one who had full title and right of disposition it passed free from price restriction.

It will be noted by the quotation that the Court carefully discriminates from a situation where the vendor is **an agent** of the patentee imposing the price restriction, and hence the case not only is not an authority for the respondents, but inferentially supports our contention that a patentee can, by proper contract, make a sale on condition, or create an agency for future sale, and retain the right to fix the price at which the user may buy, and bring the patentee and buyer into immediate relationship of vendor and vendee through an agent selected by the vendor.

There was no question in the 'Sanatogen" case of the violation by the retailer of a direct contract with the holder of the patent and the case did not decide that the holder of the patent could not con-

tract directly with the retailer as to the price at which the patented article should be sold to a user.

That case did not hold it illegal to attempt to fix the re-sale prices of the patented articles—but only that the attempt in that instance was not successful because it was **a mere notice,** not binding on strangers under the circumstances.

That case did not pretend to overrule numerous prior cases holding that it is entirely competent and proper to establish a monopoly in a patented article. It only said that it could not be done by a notice.

That case did not attempt to revolutionize and overturn the law giving the patentee the exclusive right to vend the article. It merely said that in that case he had exhausted his right to vend when he sold at his full price, and that a mere notice did not qualify or restrict the title thus sold.

Note the important distinction. In the Dr. Miles case the Court held it was illegal and unlawful to attempt to control re-sale prices of unpatented articles, because contrary to the anti-monopoly laws.

But in the Sanatogen case the Court did not hold that it was illegal or unlawful to control re-sale prices of patented articles, but only that the particular plan was not effective.

It has always been lawful to monopolize a patented article. "Its very nature is that of a monopoly" says the Bement case.

The Sanatogen case was a suit against sub-vendees to compel them to obey a notice, which notice was in distinct opposition to the title vended. This is a case to compel respect for signed contracts, contracts absolutely lawful in themselves.

XVII.

OTHER CASES DISTINGUISHED.

Standard Sanitary Mfg. Co. v. U. S. 226 U. S. 20-49, 57 L. ed. 107.

Was a suit by the Government to enjoin violation of the Sherman Act. There was a combination of a large number of manufacturers and several patents and a combination to control trade contrary to the Sherman law.

The fact that patent rights were held by some or all of the defendants was held not enough to enable the defendants to escape the law.

Even where the question of patent monopoly is involved, however, a system of uniform trade agreements based upon the use of a patented invention

which transcends what is necessary to protect such monopoly, and which practically controls the output and dictates the prices from producer to consumer on nearly **all sides of sanitary enameled iron-ware** throughout the country as illegal and void. This was an attempt under cover of patent rights to control trade on articles **not covered by any patents.**

In Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, suit was brought to restrain the sale of a copyrighted book at retail at less than $1.00 for each copy, basing it on a printed notice in the book.

As the Court said:

> "The facts disclose a sale of a book at wholesale by the owners of the copyright, at a satisfactory price, and this **without agreement between the parties** to such sale obligating the purchaser to control future sales, and where the alleged right springs from the copyright law alone." * * * * *

> "In this case the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those who **made no agreement** as to the control of future sales of the book, and took upon themselves no **obligation** to enforce the notice printed in the book." * * * * *

"In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, **with whom there is no privity of contract.**"

(Black-face ours.)

The decision in the Bobbs-Merrill case, as well as in the Sanatogen case, was grounded solely upon the principle that the owner of a patent or copyright cannot qualify the title passed by means of a **mere nrotice attached to the chattel,** so as to restrict third persons in the sale of such articles.

In the case of **Straus v. American Publishing Company, 231 U. S. 222, 58 L. ed. 192,** there was a combination of seventy-five (75%) per cent of the publishers and a majority of the booksellers in the United States united in an agreement not to sell copyrighted books (originally uncopyrighted as well) to dealers who would not maintain prices and it was held that where a copyrighted book had been sold and passed out from under the monopoly permitted by law, the price could not be kept up by **printed notices** of retail price **attached to the book.**

In the case of **Victor Talking Machine Company**

v. Strauss, 230 Fed. 449, the Circuit Court of Appeals followed the Dick rather than the Bobbs-Merrill and Sanatogen cases, and held that the plaintiff was entitled to the relief prayed for by its bill, and could maintain prices by a notice attached to the machine. This case has recently been reversed by the Supreme Court of the United States in an opinion not yet printed, and which at this time it is not possible to discuss, but it is to be assumed from the way in which the Supreme Court has regarded these questions in the Sanatogen, Bobbs-Merrill and other recent cases that the reversal was based upon the distinction, which we are urging in this case, between rights protected by direct contract and the attempt to restrict the ultimate purchaser by a **mere notice** attached to the machine.

In the case at bar, we are not attempting to claim anything by reason of any notice, but only to maintain the integrity of a contract as between the parties thereto.

We think we have quoted enough of the language of the Courts to make plain our proposition that a patented article does not pass out from under the monopoly unless a sale or transfer has been **unconditional** and **unrestricted**, and by no possible manner of interpretation can there be any escape from the numerous conditions under which the Ford Motor Company consigned automobiles to its agents.

We may then sum up this branch of the argument by saying, **FIRST,** that under the contract, whether construed as an agency contract or sale, the automobiles had not passed out from under the monopoly of the patentee; and, **SECOND,** that while it could be conceded that parties competent to contract may make any contract which they see fit, that no Appellate Court has yet held that the Sherman Aact was violated by a **contract** between the patentee and his vendee restricting the price at which the patented article may be sold, or the conditions under which it may be used, or the territory within which it may be sold.

In the Sanatogen case, which related to a patented article, it was held that the holder of the patent could not project his control forward to a subsequent purchaser by **notice** printed on the package, but there was not in that case any question of the violation of a **contract** or of the prohibition of the Sherman law.

In the **Miles Medical Company** case the Court used this language:

> "Nor can the manufacturer by **rule and notice** in the **absence of contract or statutory right,** even though the restriction be known to purchaser, fix prices for future sales.
>
> "Whatever right the manufacturer may

> have to project his control beyond his own sales must depend not only upon an inherent power incident to production and original ownership, **but upon agreement.**"

The black-face type in the quotations just made is ours, for the purpose of calling attention to the fact that the Court evidently recognized that **by contract** the patentee can project his control beyond his own **sales.**

This distinction has been recognized in cases of which United States v. Kellogg Toasted Corn Flakes Co. 222 Fed. 725-731, is an example. There the Court called attention to the fact that Bobbs-Merrill Co. v. Straus and Bauer v. O'Donnell were infringement suits—the one under a copyright, and the other under a patent and to that part of the decision in the Bobbs-Merrill case where it was said that,

> "There is no claim in this case of **contract** limitation, nor license **agreement** controlling the subsequent sale of the book."

In United States v. Keystone Watch Case Co. 218 Fed. 502-514, the Court said:

> "The defendant company attempted to restrict the prices at which the wholesaler or jobber might sell to the retailer, and to this end made a **direct agreement** with the jobber.

As we understand the decisions, such an agreement was within the company's lawful rights. Certain material parts of the Howard watch were covered by bona fide patents taken out and used for a lawful purpose and as the owner of these patents the company **had the right to make a direct agreement** with the jobbers whereby a minimum price was fixed at which the jobber might sell."

XVIII.

THE DECISIONS OF THE COURTS IN FRANCE, BELGIUM AND GERMANY ON THIS IDENTICAL QUESTION RECOGNIZE THE DIFFERENCE BETWEEN A CONTRACT REGULATING RE-SALE PRICES AND A MERE NOTICE ATTACHED TO THE ARTICLE; AND THEY UNIFORMLY HOLD THE CONTRACT BINDING, BUT THAT A MERE NOTICE IS INEFFECTIVE AND NOT BINDING.

See the cases collected in the publication recently issued by the Department of Commerce of the United States, Bureau of Corporations, entitled "TRUST LAWS AND UNFAIR COMPETITION," issued by the Government Printing Office in 1916.

FRANCE:

"Agreements to maintain fixed re-sale prices are regarded in France as legal and binding. The merchant who cuts the re-sale price after entering into such an agreement is held to have committed an unlawful act, as well as an act of unfair competition, against those of his competitors who keep their agreements. Such agreements to maintain re-sale prices are binding only upon the parties to the agreement. The manufacturer or distributor, except as noted above, has no ground for action against a merchant who cuts prices if he has not entered into a contract to maintain it. The following cases will illustrate these principles:

* * * * *

"A dealer in perfumery entered into an agreement with the manufacturer not to sell nor allow to be sold the products at prices below those fixed as a minimum * * * * * The Court sustained the right of the manufacturer to sell his goods subject to such conditions as he might impose upon the purchaser.

"The Society des Eaux minerales de Vittel distributed to the trade a circular, fixing prices * * * * * The Society brought suit

against a certain Brunet for selling below the fixed price. It was proved that Brunet bought the bottles not from the plaintiff but from a dealer who had not imposed any obligation upon Brunet regarding a re-sale price. The Court refused to consider the notice on the label as binding upon dealers to maintain the price noted thereon, and accordingly held that since no contract existed between the parties Brunet was free to resell his goods at prices that suited him."

Trust Laws and Unfair Competition, pp. 579-580, where are given the references to the cases.

BELGIUM:

"Defendant, a retailer, made a verbal contract with plaintiff, a manufacturer, not to sell his kind of little cigars below the price fixed by the latter and marked on the box. It was shown that defendant had broken this contract. The Court awarded damages to the plaintiff. * * * * *

"Defendant sold some little cigars below the price marked on the box. The notice on the box also stated that anyone not maintaining this price, or, while maintaining the price, depreciated the article by giving premiums,

would be prosecuted. There was no contract between the parties to the suit or between the defendant and the distributor to maintain prices. The Court held that in reducing prices defendant had not committed an unfair act against the manufacturer.

"A retailer sold Pall Mall cigarettes at Antwerp and Brussels below the prices indicated on the outside wrapper of the boxes. He had not entered into any contract to maintain prices. The Court decided, therefore, that he was not guilty of unfair competition against the manufacturer, holding that the right of the merchant to dispose of his goods as he sees fit is absolute if they have been legitimately procured; that the notice on the goods that they cannot be sold below a certain price does not impose upon them a condition which should be transmitted with them, and that, while the seller can bind the purchaser not to resell below a certain price, and this legal contract is obligatory for the one who makes it, it does not bind others than the contracting parties. The Court further held that the defendant had committed no unlawful act, since it was not alleged that by conniving with certain purchasers he had obtained from them the goods at prices permitting him to resell at a profit below the fixed prices, causing

them in his personal interest to break their contract with plaintiff, nor had he done anything to discredit the products.

"A similar action was brought against the defendant in the above case for selling the "Petit Larousse Illustre" dictionary below the price fixed by the publishers. It was shown that the plaintiffs had refused to deliver their books to defendant, because he would not agree to maintain the price, and that in spite of this defendant had procured indirectly a large number of copies which he sold below the fixed price. The Court of Appeal did not consider how the defendant procured the books, but decided that he had not committed an act of unfair competition in cutting the resale prices, since he was not bound by any contract.

"An association of manufacturers of pharmaceutical products sought to maintain a fixed price by various tactics, such as refusing to deliver to dealers not parties to the agreement, or deliveries to them only at the price fixed for sale to the public, so that it was impossible for them to make any profit. The Court held that while the manufacturer or proprietor of a product is free to sell it at any price that he chooses or to refuse to sell

it at all, and can also impose upon the purchaser the condition not to resell except at a fixed price, and concerted tactics of the defendant association were a restraint of the freedom of commerce and industry."

Trust Laws and Unfair Competition, pp. 592-593, where are cited the authorities quoted.

GERMANY:

"Contracts by which producers bind the persons to whom they sell not to resell at less than a fixed minimum price are considered legal in Germany and the breach of such contracts constitutes an act of unfair competition which affords a ground for injunction and the recovery of damages. * * * * *

"A retailer who was not bound by contract sold some goods below the retail price fixed by the factory. The factory brought suit under section 1 of the law of 1909, Sec. 826 of the Vicil Code, on the ground that the defendant was cognizant that all of the customers of the factory were bound not to sell below a fixed price. The court rejected this view and held that a factory could not prohibit a third party with whom it had no contract from selling its products at a lower price than the minimum

which it had fixed, for the goods might have been secured from some middleman who was not bound by the party who bought the goods from the factory.

The Court said in part:

"In any case we cannot agree with plaintiff that an act repugnant to good morals is involved merely in the reselling of the goods for less than the price imposed by the plaintiff upon his customers. The defendant has the right to sell the goods, which he has procured in an honest way, at any price satisfactory to him. If he is to act in a manner contrary to good morals, an element of unfairness must be involved, such as causing the party from whom the goods were purchased to break his contract with the plaintiff. In the absence of such an element, such agreements between manufacturers and wholesalers would, from the standpoint of the plaintiff, have, so to speak, a material effect, and a shackling of business would result which would be altogether unendurable, and which in certain cases might itself even be considered as repugnant to good morals." * * * * *

In another case of the same kind the defendant in selling cigarettes at a discount, removed the iden-

tifying number, so that it was impossible for the exclusive agent to ascertain which middleman was breaking his contract by not binding sub-dealers. The Court held that the defendant had committed an act repugnant to good morals by wilfully abetting the breach of contract of his suppliers, by buying at various times from them the cigarettes of the plaintiff sold in violation of the agreement made with the plaintiff, by removing the identifying number in order to prevent anyone from finding out his source of supply, and by selling the goods at less than the fixed price. Such acts, the Court held, were not in harmony with the rules of propriety observed by all just and reasonable men and were a violation of section 1.

> Trust Laws and Unfair Competition, pp. 651-652, where are cited the authorities quoted.

In considering the Miles Medical Company and "Sanatogen" cases and their application in a case involving a different state of facts, or rather a total absence of the facts on which those decisions depend, it is well to bear in mind the observation of the Court in the "Sanatogen" case that,

> "No more is to be decided in each case than is directly in issue."

XIX.

TO SUPPORT THE CONTENTION IN THIS CASE IT WILL BE NECESSARY TO DECIDE THAT A PRINCIPAL CANNOT MAKE IDENTICAL CONTRACTS WITH A LARGE NUMBER OF AGENTS AND CONTROL THEIR CONDUCT AS SUCH AGENTS IF TO DO SO WILL FORBID THOSE AGENTS FROM COMPETING WITH EACH OTHER AND THEREBY WITH THE PRINCIPAL HIMSELF.

But if the Court finds itself able to disregard the contract and convert a consignment into an absolute sale, it will further be necessary, to support the decree, to hold that a patentee cannot by contract restrict the price at which the party contracting may sell the patented article, a limitation never heretofore imposed.

We have discussed these phases of the case thus fully, and may well conclude this part of our argument by quoting from the Button Fastner case (77 Fed. 288-294), which has met the approval of the Supreme Court:

> "Upon what authority are we to circumscribe the exercise of the privileges awarded a patentee? In considering any question in

respect of restraints upon the liberty of contracting, imposed by principles of public policy, we should bear in mind that very high considerations of public policy are involved in the recognition of a wide liberty in the making of contracts; this caution was well expressed by Sir George Jessell in Registering Co. v. Sampson, L. R. 19 Eq. 462-465, who said:

> 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is against public policy, because, if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider,—that you are not lightly to interfere with this freedom of contract.'

"Especially is this caution applicable when we sit in judgment upon the limitations which a patentee may put upon the use of his invention."

Under any view of the contract there was no undue restraint of trade.

XX.

APPLICATION OF THE RULE OF REASON.

We are now ready to advance with the argument a step further and submit that it is immaterial whether the contract under discussion created an agency or effected a sale, for the reason that under the rule of reason as laid down by the Supreme Court in the Standard Oil and Tobacco cases the Sherman law has not been violated.

We submit that the contract between the plaintiff and its agents does not restrain trade within the meaning of the Sherman Act but is only a reasonable provision for the conduct and extension of plaintiff's business and the sale of its products. While the contract fixes the prices at which Ford automobiles can be sold to the public, that is not the only or the principal end sought but is only incidental.

Plaintiff seeks by its agency contract, among other things, to be represented by agents who will not only advance the sale of Ford automobiles but at the same time maintain the standard of service and accommodation to Ford owners which is so important to the popularity of an automobile and more than anything else promotes its sale.

"A. I made it a point after calling on the

agents in each town, in my spare moments to call on the Ford owners, who owned Ford cars, and in a round-about way, without disclosing my identity, find out the kind of service they were getting from the agents in that particular district or locality; whether the service was good, or whether they had over-charged them, and whether they were taken care of in parts and everything that would be of benefit to the Ford owner. I considered it my duty when I was with the company to do that as a protection to the man who owned the car." (Transcript p. 286.)

In this connection we can well quote the language used by the Circuit Court of Appeals for the eighth circuit, speaking by Judge Sanborn, in the case of **Joseph P. Whitwell v. Continental Tobacco Company et al. (125 Fed. 454), 64 L. R. A. 694, 695, 697:**

"If, on the other hand, it promotes, or but incidentally or indirectly restricts, competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation. Hopkins v. United States, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19

Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 616, 43 L. ed. 300, 306, 19 Sup. Ct. Rep. 50; United States v. Joint Traffic Asso. 171 U. S. 505, 568, 43 L. ed. 259, 287, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 245, 44 L. ed. 136, 149.

* * * * *

"In the contract, combination, or conspiracy which is charged against the defendants in this case there is nothing of this character. The tobacco company is a manufacturer and trader, and McNie is its employee. Conceding, for the purpose of the argument only, but not deciding, that there may be a contract, combination, or conspiracy in restraint of trade between an employer and his employee, no such contract, combination, or conspiracy between them can be a violation of this law, unless it is in restraint of interstate commerce; and the only combination charged against the defendants is their combination to make sales of the commodities of the tobacco company profitable to purchasers to those persons only who refrain from dealing in the wares of their competitors. The two defendants in this case have never been and never intended to be competitors. There has never been any competition, actual or possible, between them, and hence no competition be-

tween them is or can be restrained by their combination to conduct the trade of the tobacco company. The contract, combination, or conspiracy charged against them did not restrict competition between them and the independent manufacturers or dealers who, according to the complaint, were their competitors, because it left the latter free to select their purchasers and to fix the prices of their goods and the terms at which they would dispose of them to all intending purchasers."

And the same Court speaking again by the same judge said in **Phillips v. Iola Portland Cement Co. 125 Fed. 594, 595:**

" * * * * * The only defendant served with process, answered that the contract was illegal and void under Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), because it provided that Parr & Co. should not sell the cement, ship it, or allow it to be shipped, without the State of Texas.

"It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle com-

petition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states. Hopkins v. U. S. 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. ed. 290; Anderson v. U. S. 171 U S. 604, 616, 19 Sup. Ct. 50, 43 L. ed. 300; U. S. v. Joint Traffic Assn. 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. ed. 259; Addyston Pipe & Steel Co. v. U. S. 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. ed. 136; U. S. v. Trans-Missouri Freight Assn. 166 U. S. 290, 339, 340, 342, 17 Sup. Ct. 540, 41 L. ed. 1007; U. S. v. Northern Securities Co. (C. C.) 120 Fed. 721, 725. The

application of this rule to the facts of the case in hand leaves no doubt that there was nothing in the contract before us obnoxious to the provisions of the anti-trust law of 1890. The Iola Cement Company had no monopoly of the manufacture or sale of cement in the United States. It was surrounded by competing manufacturers, and the contract which it made with Parr & Co., of Galveston, had no direct or substantial effect upon competition in trade among the states. It left the manufacturers who were competing with the plaintiff for the trade of the country free to select their customers, to fix their prices, and to dictate their terms for the sales of the commodities they offered, so that in this regard no restraint whatever was imposed."

The rule applicable is summed up in Bigelow v. Calumet & Hecla Mining Co. 167 Fed. 704-712, where the Court said:

"We are brought to the question whether the necessary effect of the alleged combination is to restrain trade or create a monopoly. It is settled that a combination does not violate the Federal statute merely because it may indirectly, incidentally, or remotely restrain trade or tend towards monopoly. If its necessary effect is to stifle or to directly and sub-

> stantially restrict interstate commerce, it falls under the ban of the law. On the other hand, if it only incidentally or indirectly restricts competition, while its main purpose and chief effect are to promote the business and increase the trade of the consumers, it is not denounced or voided by that law. U. S. v. E. C. Knight Co. 39 L. ed. 325, 43 L. ed. 290-300."

No fact or evidence or statement exists in this case to justify even an inference that trade in automobiles has been in the least restrained by the contract under discussion.

There is nothing in the record in the case at bar to indicate that the contract therein involved was anything more than one of "the ordinary contracts or combinations of manufacturers, merchants, and traders," or that it contained anything more than "the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful."

It is contrary to the knowledge and experience of every man in the community to claim that such a contract could have any effect to restrain trade in automobiles, when it is common knowledge and every day experience that the different makes of automobiles are too numerous to keep track of, all actively and persistently competing for business. The difficulty that confronts the public is not a trade un-

duly restrained, but rather how to escape the solicitations of rival agents eagerly hunting down a prospective or possible purchaser.

As was said by the Circuit Court of Appeals for the fifth circuit in the case of Cole Motor Car Co. v. Hurst, 228 Fed. 280:

> "There are a multitude of other companies from whom purchasers can readily obtain motor cars, varying in little, if anything, from the perfectibility of the car made by the plaintiff company. It is common knowledge that most, if not all, of such motor companies avail themselves of similar arrangements. The public, indeed, finds it no no small task to avoid the competition and solicitations of the agents or consignee of such companies. Periodicals of every description portray, advertise, and enlarge upon the variety and superiority of their excellencies. There, surely, then, has been no restraint of this trade. Was it not, then, easily possible that in the flourishing counties of the Lone Star State enumerated in the contract, notwithstanding the same, any one might have purchased a Ford, a Cadillac, a Pierce-Arrow, a Packard, a Chalmers, a Hudson, or any other of the multitudinous machines which are being constantly manufactured and offered for sale at widely varying

> prices? Where, then, is the restraint of trade in this transaction?"

It is beyond question that contracts of the character under discussion, not only do not operate to restrict competition, but on the contrary stimulate the agents to greater zeal and activity in pushing sales and thereby directly stimulate competition.

The restraint, if any, is so far a mere incident to the main purpose of extending the sales of the manufactured product that it cannot bring the contract within the provision of the Sherman Act without running counter to the rule of reason which forms the guide to the consideration of the law by the Supreme Court.

The changed viewpoint from which these questions are to be considered was succinctly stated in the case of O'Halloran v. American Sea Green Slate Co. 207 Fed. 187-190:

> "The contention for a long time made, and still continued by many, that any agreement which to any extent and in any degree whatever effects or restricts and limits interstate commerce is illegal, is not supported by the recent decisions of the Supreme Court, and it seems to be settled that there must be an undue restriction or restraint, the question of

fact to be settled by the Court applying the rule of reason."

In discussing the case in which the Supreme Court enunciated the rule of reason, Judge Lacombe said:

United States v. Hamburg-American S. S. Line, et al. 216 Fed. 971, 972, 974,

"The writer's opinion as to what, under prior decisions, was the construction to be given to the Sherman Anti-Trust Act, will be found fully set forth in U. S. v. American Tobacco Co. (C. C.) 164 Fed. 700. If that construction were followed in this case, there could be no doubt as to the conclusion to be reached upon the facts proved. It is practically not disputed that, by the various agreements and conferences which together constitute the combination complained of, that branch of trans-Atlantic commerce which is concerned with the transport of steerage passengers is arbitrarily interfered with so that the proportions of it carried by the various lines, which have so combined, are not as they would be if full, free and unrestricted competition were the sole controlling power to effect the distribution.

"Since the decision above cited, however,

there have been two exhaustive opinions of the Supreme Court dealing with this act: Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912-D 734; United States v. American Tobacco Co. 221 U. S. 106, 31 Sup. Ct. 632, 55 L. ed. 663. The effect of these would seem to be that contracts and methods of business, which do in fact restrain or interfere with competition, are not to be held obnoxious to the provisions of the act, unless such restraint or interference is 'unreasonable' or 'undue.'

" 'Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs, which it was thought would flow from the undue limitation of competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reason-

ably forwarding personal interest and developing trade, but, on the contract, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy * * * The statute * * * evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint. Standard Oil Co. v. United States, 221 U. S. 58-59-60, 31 Sup. Ct. 515, 55 L. ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912-D 734.'

"In applying the rule of reason to the construction of the statute, it was held in the Standard Oil case that as the words 'restraint of trade' at common law and in the law of the country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which

operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was, therefore, pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose.' United States v. American Tobacco Co. 221 U. S. 179, 31 Sup. Ct. 648, 55 L. ed. 663."

In United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243-258, the Supreme Court re-states the rule as follows:

"That the act of Congress does not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose, was pointed out in the Standard Oil case, 221 U. S. 1, 55 L. ed. 619. In that case it was also said that the words 'restraint of trade' should be given a meaning which would not

> destroy the individual right of contract, and render difficult, if not impossible, any movement of trade in the character of interstate commerce, the free movement of which it was the purpose of the statute to protect."

In Nash v. United States, 229 U. S. 373, 57 L. ed. 1232-5, the Supreme Court again referred to the Standard Oil and American Tobacco Company cases, and said:

> "Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of interest of the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

It will puzzle the most astute to bring the contract in the case at bar within the prohibition thus defined.

A contract creating an agency and providing for consignments for sale to the agent, does not disclose any such "intent" nor is its "inherent nature" calculated to unduly or otherwise restrict competition as forbidden by the Sherman law. Nor is there anything in this record from which the Court can conclude that competition has been unduly restrained, or restrained at all.

It is evident from the language of the law itself and from the numerous cases interpreting it that the object of Congress in the adpotion of the Sherman law was not to prescribe the manner in which the individual should conduct his business—whether directly or through the agents chosen by him—but rather to forbid and prevent combinations between individuals who might otherwise be competitors, whereby that competition may be in any way restrained. It does violence to the language of the contract between the Ford Motor Company and its agents; it does violence to the manifest intent of regulating the manner in which the company's business should be conducted by its agents; it is a logical absurdity, to say that the contract in question is a contract in restraint of trade under the Sherman law.

It is on the contrary a contract whereby the Ford Motor Company seeks to obtain and secure the widest possible stable market, and the most satisfactory of all advertisements of any business—a body of satisfied customers who have reason to believe each one has received as fair and equitable treatment as any other purchaser of Ford automobiles.

As was said in Whitwell v. Continental Tobacco Company:

> "If on the other hand it promotes or but incidentally or directly restricts competition while its main purposes and chief effect are

> to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation." (And see authorities cited.)

No other automobile manufacturer has combined with the Ford Motor Company, but the Ford Motor Company competes in the open market with scores upon scores of other makers of automobiles and the purpose and effect of the contract under consideration is to make that competition as effective as possible and not to restrain it.

In the Whitwell case just quoted from, the Court used the following language which is pursuasive in this case:

> "The right of each competitor to fix the price of the commodities which he offers for sale, and to dictate the terms upon which he will dispose of them, is indispensable to the very existence of competition."

And again:

> "The tobacco company, and its competitors were not dealing in articles of prime necessity, like corn and coal, nor were they rendering public or quasi public service, like railroad

> and gas corporations. Each of them, therefore, had the right to refuse to sell its commodities at any price. Each had the right to fix the prices at which it would dispose of them, and the terms upon which it would contract to sell them. Each of them had the right to determine with what persons it would make its contracts of sale. * * * * * There is nothing in the act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200) which deprives any of these competitors of these rights. If there had been, the law itself would have destroyed competition more effectually than any contracts or combinations of persons or of corporations could possibly have stifled it. The exercise of these undoubted rights is essential to the very existence of free competition, and so long as their exercise by any person or corporation in no way deprives competitors of the same rights, or restricts them in the use of these rights, it is difficult to perceive how their exercise can constitute any restriction upon competition or any restraint upon interstate trade."

It will doubtless be claimed that from the fact that by the terms of the contract the Ford Motor Company received 85% of the list price of its automobiles and that is the maximum amount of cash it expected to obtain, it follows that there was actually

a sale to the agent and not a consignment, and this contention has been advanced notwithstanding the clear language of the contract and the agreement that either party might at any time, on notice, cancel the contract and the Ford Motor Company might take back the automobiles and return the 85%, and notwithstanding the other conditions of the contract by which both parties made clear their intention to enter into the relationship of principal and agent, with absolute control by the principal over all transactions in its behalf by the agent.

And there is nothing to impugn the absolute good faith of the contract.

But it is not true to say that the 85% was all that the Ford Motor Company expected to receive from the sale of its machines and the contract contains provisions for other considerations moving to the Ford Motor Company, considerations that from the standpoint of a manufacturer producing each year hundreds of thousands of automobiles are more important than the profit on sales brought about by any local agents.

With a produce of such magnitude the problem of reaching the market and obtaining customers, each one of whom must be induced to be a booster for the "Ford," is of far more importance than the mere percentage of profit on specific sales.

With a buying public, in the main ignorant of the qualities of the machine purchased, it is a matter of common knowledge that the popularity of different makes of automobiles depends mainly on the quality of the service given by the selling agents.

Automobiles of no special merit as compared with others selling at the same or lower prices have had a wide popularity because of the carefully cultivated belief of the public that owners of such machines are well taken care of and given good service by the representatives of the manufacturer wherever found.

On the other hand other makes of automobiles of equal or greater merit have been hopelessly condemned and the manufacturer driven into bankruptcy because of the failure of the manufacturer to secure that character of representation by agents that gives satisfaction to owners.

It is a truism that a "satisfied owner is the best advertisement."

To get this character of representation and secure this advertising as a basis on which to build future business of larger dimensions, is the real motive and consideration of the contract under consideration.

For these reasons the Ford Motor Company requires in its contracts with its agents that all

agents equip proper shops and be prepared to give, and to give "Ford Service" to Ford owners the world over, no matter where the particular purchase may have been made.

From the broad point of view of a manufacturer of a large and increasing product, looking to the future and a greater business, this is the one most important feature of the agency contract, and all else is subordinate to that and of minor importance.

For today only it might be easier to sell f. o. b. factory, and today the Ford Motor Company might be able to thus dispose of all its output.

But to build up and maintain and increase business, a broad, forward looking plan is needed, and of the contracts under consideration we can say, as was said in the case of Whitwell v. American Tobacco Co., hereinbefore quoted from, that the "main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it."

When the contract is thus capable of a reasonable interpretation based on sound business principles, the only interpretation consistent with the language and intent of the contract, what justification can be found for going outside the record, into the realm of speculation and suspicion, to suggest a sinister purpose to evade a law, and based

on such assumed purpose, read into the contract a meaning of which the language is incapable, and therefrom draw the conclusion that the Ford Motor Company is conspiring with its own agent to violate the law, by restraining trade in its own product, for which it had supposed it was trying to obtain the widest market, through the heretofore lawful plan of controlling its own agents.

It is sometimes true that a court may "read between the lines" of a contract to enable it to get at the real intentions of the parties, but never is it permissible to disregard entirely "the lines" of the written contract and find a new and different contract in the blank spaces between the lines.

We, therefore, submit to the court that the contract of agency between plaintiff and the defendants, the Eugene Ford Auto Company, was a valid, reasonable and proper contract, entitled to be construed as made, and no evidence was introduced or offered tending in the least to impeach the good faith with which the contract was made.

We further submit that the court erred in taking plaintiff's case from the jury, and in holding that under the facts and circumstances of this case either demand or tender was required of plaintiff as a prerequisite to a recovery.

We further submit that in any view of the case

the damages awarded defendants were unwarranted by the evidence and excessive, and based on erroneous instructions by the court.

Respectfully submitted,

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